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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 687

THE UNITED STATES OF AMERICA, APPELLANT

vs.

NEAL POWERS AND RENE ALLRED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

FILED FEBRUARY 17, 1939

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INDEX

1 IN UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Criminal No. 7354

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

H. E. HINES: NEAL POWERS AND RENE ALLRED, DEFENDANTS

Praecipe for transcript of record

Filed January 28, 1939

To the CLERK, *United States District Court,*
Southern District of Texas:

The appellant hereby directs that in preparing transcript of record in this cause in the United States District Court for the Southern District of Texas, in connection with its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of Indictment, filing of demurrers and motions to quash and entry of order and judgment sustaining demurrers and motions to quash.
2. Indictment.
3. Demurrers and motions to quash.
4. Opinion.
5. Judgment sustaining demurrers and motions to quash.
6. Petition for appeal to the Supreme Court.
7. Statement of jurisdiction of Supreme Court.
8. Assignments of Errors.
9. Order allowing appeal.
10. Notice of service on appellee of Petition for Appeal Order allowing appeal, assignments of errors and statements as to jurisdiction.
11. Citation.
12. Praecipe.

DOUGLAS W. MCGREGOR,
United States Attorney,
Southern District of Texas.

2 [File endorsement omitted.]

3 [Caption omitted.]

4 In United States District Court

Presentment of indictment and order to file and docket
Entered September 17, 1938

The Grand Jury this day came into Court, a quorum thereof being present, and in open court presented the following bill of indictment, to wit:

The United States vs. H. E. Hines, Neal Powers, and Rene Allred. Cr. No. 7354. Charge: Conspiracy to violate Sec. 715 (b), Title 15 U. S. C. A. as amended, Vio. Sec. 88, Title 18 U. S C. A., and unlawfully transporting, etc., in Interstate Commerce, certain Petroleum Products, etc., Vio. Sec. 715 (b), Title 15 U. S. C. A., as amended, which said indictment is ordered filed and entered upon the criminal docket of this court at the Houston Division.

5 In United States District Court

[Title omitted.]

Cr. No. 7354

Docket entries

Charge: Conspiracy to violate Sec. 715 (b), Title 15 U. S. C. A. as amended, Vio. Sec. 88, Title 18 U. S. C. A., and unlawfully transporting, etc, in Interstate Commerce, Certain Petroleum Products, etc., Vio. Sec. 715 (b), Title 15 U. S. C. A., as amended.

Sept. 17, 1938. Order to file and docket entered.

Sept. 17, 1938. Indictment filed.

Sept. 17, 1938. Certificate of the Grand Jury filed.

October 14, 1938. Demurrer and Motion of Neal Powers to dismiss and quash indictment, filed.

October 14, 1938. Demurrer and motion of Rene Allred to dismiss and quash indictment, filed.

January 4, 1939. Memorandum of Court, sustaining defendants demurrers to indictment and motions to quash indictment, filed.

January 4, 1939. Order case dismissed as to Neal Powers and Rene Allred, entered.

6 In United States District Court

[Title omitted.]

Indictment

Filed September 17, 1938

At the February term of the District Court of the United States for the Southern District of Texas, Houston Division, begun and held at the city of Houston, in said district in the Fifth Circuit,

on the twenty-eighth day of February in the year of our Lord One Thousand Nine Hundred and Thirty-eight, the Grand Jurors of the United States of America, within and for said District, having been duly summoned, tried, impaneled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Texas, upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present:

That H. E. Hines, whose first name is to the Grand Jurors unknow, Neal Powers and Rene Allred, hereinafter known and referred to as conspirators, and indicted; and Otis H. Gibson, Oren C. Roberts, D. D. Feldman, A. N. Adelson, L. R. Hepworth, M. D. Carter, Frank W. Bennett, George Arnold, Jr., Shuford Farmer, Adel Oil Company, Higrade Oil Company, Crescent Oil & Transport Company, Gulf Oil Marketing Company, Channel Transport & Marketing Company, D. R. Zachry, E. C. Hines, Ralph A. Wilson, Manice M. Hill, Charles S. Atchison, R. C. Horn, and J. A. Trotter named herein and hereinafter referred to as conspirators, but not indicted; within three years last past, in the State of Texas, and in the Southern District of Texas, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together, and with one another, and each with the other, and with divers other persons whose names are to the Grand Jurors unknown, and for that reason not mentioned herein, to commit divers, various, and sundry offenses against the United States of America, towit:

(a) To unlawfully and knowingly violate the laws of the United States, in particular an Act of Congress approved February 22, 1935, being Public No. 14, 74th Congress and entitled:

"An Act to regulate Interstate and Foreign Commerce in Petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of
7 the State laws and for other purposes," (as amended), by producing, transporting, and withdrawing from storage, petroleum, which or a constituent part of which, was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of the State of Texas, and under the regulations and orders prescribed thereunder by the Railroad Commission of the State of Texas, and its officers by producing oil in excess of the allowed oil, as provided by the orders of the Railroad Commission, and transporting said oil from the Conroe Oil Field, in Montgomery County, Texas, to a point outside of the State of Texas, towit: Marcus Hook, Pennsylvania, by means of a gathering line owned and operated by the Adeloil Company and a pipe line owned, connected thereto and operated by the Channel Transport and Marketing Company and connected with the gathering line of the Adeloil Company and oil tankers operated by the Sun Oil Company, all in violation of the

laws of the United States, and that said conspiracy was continuously in existence and in the process of execution by said conspirators and divers other persons to the Grand Jurors unknown throughout all the time from on or about the fourth day of September 1935, until on or about the fifteenth day of March 1937, and on each and every day intervening and did then and there, and on each of said days, have it understood and agreed together and among themselves, and with other persons to the Grand Jurors unknown, that said unlawful combination, confederation, conspiracy, and agreement was to be executed, carried out, and continued in existence in substantially the following manner towit:

Certain of the conspirators were to produce oil in excess of that permitted by the laws of the State of Texas and the rules and regulations of the Railroad Commission of the State of Texas, from the following leases, towit:

(1) South-Texas Development Lease, T. & N. O. Railway Survey No. 6, Montgomery County, Texas, operated by Hi-Grade Oil Company.

(2) Llewellyn lease, Hamlett Survey, Conroe, Texas, operated by Adeltex Oil Company.

Certain conspirators were to file false and fraudulent reports with the Railroad Commission, towit: Tender Operations Statements, Monthly Pipe Line and Crude Oil Storage Reports, and
8 Monthly Producers Reports; certain conspirators were to forge, procure and furnish crude oil tenders Form SW–3, duly approved by the Railroad Commission of the State of Texas, but which in fact were not valid crude oil Tenders Form SW–3; and certain conspirators were to transport said oil by pipeline from the wells producing said oil on the Leases hereinabove mentioned to ship-side at the Norsworthy Terminal, Clarion Docks and American Petroleum Company Docks, on the Houston Ship Channel, Harris County, Texas, all in violation of Section 715 (b), Title 15, United States Code Annotated.

That in pursuance of said unlawful combination, confederation, conspiracy, and agreement, and in order to effect the object and purpose of same, the defendants, and other persons to the Grand Jurors unknown, committed the following and other Overt Acts:

OVERT ACTS

(1) That on or about August 20, A. D. 1935, Neal Powers, Otis H. Gibson, D. D. Feldman, conspirators, and Mark I. Westheimer conferred in the office of the said Mark I. Westheimer, attorney for D. D. Feldman, in the Gulf Building at Houston, Texas, regarding the running, producing, and handling of contraband oil from the Conroe Field, at which time defendant Neal Powers endeavored to persuade the said Mark I. Westheimer that said transactions were in all things lawful.

(2) That sometime in the latter part of September 1935, Otis H. Gibson conferred with Charles S. Atchison and R. C. Horne, Atchison representing the owners of royalty under the aforesaid lease operated by the Higrade Oil Company, and Horne being an owner of royalty under the said lease, to secure their consent to the running of more oil than was permitted under the orders of the Railroad Commission, they to be paid the sum of fifty cents per barrel for such oil so run when the posted price at that date was $1.15 per barrel.

(3) That beginning on or about the 20th day of September 1935, George Arnold, Jr., Otis H. Gibson, H. E. Hines, L. R. Hepworth, and Gulf Oil Marketing Company caused to be commenced the construction of a pipe line in Montgomery County running from the Bertrand Pump Station of the Adeloil Company gathering system to the Higrade Lease, which said pipe line was completed and connected to said Higrade Lease on or about October 24, 1935,
9 which said construction and completion was secret and clandestine and without the authority of the Railroad Commission of the State of Texas thereunto or at any time thereafter had.

(4) That on or about November 20, 1935, Adeloil Company contracted to sell, and Channel Transport and Marketing Company contracted to buy, not less than 400 barrels per day and not exceeding 1,000 barrels per day of common storage Conroe crude oil, commencing at 7:00 a. m., January 1, 1936, and continuing until 7:00 a. m., January 1, 1937.

(5) That on or about the 25th day of October 1935, Higrade Oil Company, by H. E. Hines, filed a Producers Authorization Form SW–1, nominating the Adeloil Company to gather oil from their leases, said nomination remaining unchanged throughout the term of this conspiracy, when, in fact, said Adeloil did not gather or intend to gather the oil from said leases because the oil was gathered by that certain line set out in (3) hereof.

(6) That on or about October 25, 1935, Adeloil Company, by Manice M. Hill filed their Forecast Tender Form SW–2 for the month of October to gather the monthly allowable from the lease of the operator Higrade Oil Company, and each month thereafter during the term of this conspiracy, said Adeloil Company filed a like forecast tender to gather the oil from the Higrade Lease, when in fact said oil was gathered by that certain line set out in (3) hereof.

(7) That on or about October 18, 1935, D. D. Feldman acknowledged his signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 9,987.42 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 9,987.42 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(8) That the Channel Transport and Marketing Company did, on or about the 18th day of October 1935, receive 9,987.42 barrels of

contraband oil and did comingle such oil with other oil, so that this oil became a constituent part of said oil, which said comingled oil or a part thereof was subsequently transported from the State of Texas.

(9) That on or about October 24, 1935, Manice M. Hill acknowledged her signature to a certain SW–3 crude oil tender from
10 Adeloil Compahy to Channel Transport and Marketing Company for 10,000.00 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 10,000.00 barrels of crude oil mentioned in said tender signed by Manice M. Hill.

(10) That the Channel Transport and Marketing Company did on or about the 24th day of October 1935 receive 2,475.05 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(11) That on or about November 1, 1935, D. D. Feldman acknowledged his signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 40,000 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 40,000.00 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(12) That the Channel Transport and Marketing Company did on or about the 1st day of November 1935 receive 4,043.14 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(13) That on or about November 20, 1935, D. D. Feldman acknowledged his signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 9,528 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 9,528 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(14) That the Channel Transport and Marketing Company did on or about the 20th day of November 1935 receive 1,601.03 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof, was subsequently transported from the State of Texas.

(15) On or about November 15, 1935, Adeltex Company filed with the Railroad Commission their monthly producers Report Statewide Form E. B. for the month of October, falsely reporting that no
11 oil in excess of the allowable oil was produced and delivered from said lease, whereas the true fact is that a much greater amount of oil than the allowable oil was produced and delivered from said lease during the month of October 1935.

(16) On or about December 5, 1935, application for a charter of Crescent Oil and Transport Company was filed, said application being approved on the 7th day of December 1935, and incorporated as a Texas corporation.

(17) That on or about December 6, 1935, Manice M. Hill acknowledged her signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 35,000 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 35,000 barrels of crude oil mentioned in said tender signed by Manice M. Hill.

(18) That the Channel Transport and Marketing Company did, on or about the 6th day of December 1935 receive 11,466.14 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(19) That on or about December 17, 1935, Manice M. Hill acknowledged her signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 10,000 barrels of crude oil failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 10,000 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(20) That the Channel Transport and Marketing Company did, on or about the 17th day of December 1935 receive 10,000 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(21) On or about December 15, 1935, Adeltex Company filed with the Railroad Commission their monthly Producers Report Statewide Form E. B. for the month of November, falsely reporting that no oil in excess of the allowable oil was produced and delivered from said lease, whereas, the true fact is that a much greater amount of
12 oil than the allowable oil was produced and delivered from said lease during the month of November 1935.

(22) That on or about December 21, 1935, defendant Gulf Oil Marketing Company paid the balance due on the purchase of the pipe to construct the line set out in (3) hereof.

(23) That on or about January 4, 1936, Manice M. Hill acknowledged her signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 38,000 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 38,000 barrels of crude oil mentioned in said tender signed by Manice M. Hill.

(24) That the Channel Transport and Marketing Company did, on or about the 4th day of January 1936, receive 25,361.55 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil, or a part thereof was subsequently transported from the State of Texas.

(25) That on or about January 11, 1936, D. D. Feldman acknowledged his signature to a certain SW-3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 15,000 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 15,000 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(26) That the Channel Transport and Marketing Company did, on or about the 11th day of January 1936, receive 8,405.51 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(27) That on or about January 15, A. D. 1936, M. D. Carter, Neal Powers, and Otis H. Gibson met at the Manhattan Cafe, in Victoria, Texas, at which time the said Otis H. Gibson paid to M. D. Carter approximately $700.00, representing five cents per barrel for the contraband oil run during the month of December 1935.

(28) On or about January 15, 1936, Adeltex Company filed with the Railroad Commission their monthly Producers Report Statewide Form E. B. for the month of December, falsely reporting that
13 no oil in excess of the allowable oil was produced and delivered from said lease, whereas the true fact is, that a much greater amount of oil than the allowable oil was produced and delivered from said lease during the month of December 1935.

(29) That on or about February 3, 1936, D. D. Feldman acknowledged his signature to a certain SW-3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 12,000 barrels of crude oil failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 12,000 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(30) That the Channel Transport and Marketing Company did, on or about the 3rd day of February 1936, receive 6,743.52 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(31) That on or about February 3, 1936, D. D. Feldman acknowledged his signature to a certain SW-3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 30,000 barrels of crude oil failing to recite that said oil had been or would be received under authority of a valid tender having any relation or con-

nection whatsoever with the Adeloil Company or the 30,000 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(32) That the Channel Transport and Marketing Company did on or about the 3rd day of February 1936, receive 13,676.03 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(33) Neither prior to February 10, 1936, nor at any time thereafter, did Adeloil Company the owner of the line from the Higrade lease to Bertrand tanks on the Adeloil line, Channel Transport and Marketing Company, file their respective correct tender operations statements Form SW–6 with the Railroad Commission of Texas, as provided by law.

(34) On or about February 15, 1936, Adeltex Company filed with the Railroad Commission their monthly Producer's Report Statewide Form E. B. for the month of January, falsely reporting that
14 not in excess of the allowable oil was produced and delivered from said lease, whereas the true fact is that a much greater amount of oil than the allowable oil was produced and delivered from said lease during the month of January 1936.

(35) That on or about March 4, 1936, D. D. Feldman acknowledged his signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 6,500 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 6,500 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(36) That the Channel Transport and Marketing Company did, on or about the 4th day of March 1936, receive 4,812.91 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof, was subsequently transported from the State of Texas.

(37) That on or about March 3, 1936, D. D. Feldman acknowledged his signature to a certain SW–3 crude oil tender from Adeloil Company to Channel Transport and Marketing Company for 30,000 barrels of crude oil, failing to recite that said oil had been or would be received under authority of a valid tender having any relation or connection whatsoever with the Adeloil Company or the 30,000 barrels of crude oil mentioned in said tender signed by D. D. Feldman.

(38) That the Channel Transport and Marketing Company did on or about the 3rd day of March 1936, receive 16,887.40 barrels of contraband oil and did co-mingle such oil with other oil, so that this oil became a constituent part of said oil, which said co-mingled oil or a part thereof was subsequently transported from the State of Texas.

(39) That on or about March 10, 1936, Otis H. Gibson, M. D. Carter, and Rene Allred met in the Roosevelt Hotel at Waco, Texas, and conferred regarding the substitution of false E. D. pipe line reports of

the Channel Transport and Marketing Company in the Railroad Commission's Office at Austin, which reports related to contraband oil.

(40) That on or about March 12, 1936, Neal Powers at Tyler, Texas, telephoned Rene Allred at the Baker Hotel, Dallas, Texas.

(41) That on or about March 14 A. D. 1936, Rene Allred at Tyler, Texas, placed a long distance telephone call for M. D. Carter at the Roosevelt Hotel, Waco, Texas.

15 (42) That on or about March 18, 1936, Rene Allred at Tyler, Texas, called Otis H. Gibson at Houston, Texas, by long distance telephone.

(43) That on or about April 3 A. D. 1936, Neal Powers at Tyler, Texas, talking by long distance telephone to Abe N. Adelson at Houston, Texas, assured the said Abe N. Adelson that all matters connected with the producing, transporting, and handling of the said contraband oil were all right and that he, Adelson, would not get into any trouble.

(44) That on or about April 6, 1936, Frank Bennett furnished an aeroplane to defendants Otis H. Gibson and Shuford Farmer to fly to Fort Worth.

(45) That on or about April 6, 1936, defendant Shuford Farmer, on behalf of Frank Bennett, offered Olin Culberson, Director of Pipe Department of the Oil and Gas Division of the Railroad Commission of the State of Texas, the sum of $2,500.00 per month, if the said Olin Culberson would cover up a 30,000 barrel hot tender.

That said unlawful combination, confederation conspiracy and agreement, and the acts of the said H. E. Hines, the said Neal Powers, and the said Rene Allred, and other persons to the Grand Jurors unknown in pursuance thereof were contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforssaid do further present: That H. E. Hines, whose first name is to the Grand Jurors unknown, Neal Powers, and Rene Allred on or about the twenty-eighth day of November A. D. 1935 within the aforesaid division, district, and circuit and within the jurisdiction of this Court, did then and there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce from the Conroe Oil Field in Montgomery County, State of Texas, to a point outside of the State of Texas to wit: Marcus Hook, Pennsylvania, certain petroleum products, to wit: One Hundred and Nine Thousand four hundred sixteen and 47/100 (109,416.47) barrels of crude oil petroleum, a constituent part of which was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage, under the laws of the State of

Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of
16 such State; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THIRD COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That H. E. Hines whose first name is to the grand jurors unknown, Neal Powers and Rene Allred, on or about the fourth day of November A. D. 1935, within the aforesaid division, district, and circuit and within the jurisdiction of this Court, did then and there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce, from the Conroe Oil Field in Montgomery County, State of Texas, to a point outside of the State of Texas to wit: Marcus Hook, Pennsylvania, certain petroleum products to wit: One hundred and eight thousand six hundred seventy-four and 67/100 (108,674.67) barrels of crude oil petroleum, a constituent part of which was produced, transported and withdrawn from storage in excess of the amounts permitted to be produced, transported and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That H. E. Hines, whose first name is to the Grand Jurors unknown, Neal Powers and Rene Allred, on or about the fourteenth day of December A. D. 1935, within the aforesaid division, district, and circuit and within the jurisdiction of this Court, did then and there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce, from the Conroe Oil Field in Montgomery County, State of Texas, to a point outside of the State of Texas to wit: Marcus Hook, Pennsylvania, certain petroleum products, to wit: One hundred and six thousand, seven hundred seventy-nine and 86/100 (106,779.86) barrels of crude oil petroleum a constituent part of which was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage, under the laws of the
17 State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FIFTH COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present: That H. E. Hines, whose first name is to the grand jurors unknown, Neal Powers and Rene Allred, on or about the thirtieth day of December A. D. 1935, within the aforesaid division, district and circuit and within the jurisdiction of this Court, did then and there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce, from the Conroe Oil Field in Montgomery County, State of Texas, to a point outside of the State of Texas, to wit: Marcus Hook, Pennsylvania, certain petroleum products, to wit: One hundred and seven thousand, two hundred sixty and 79/100 (107,260.79) barrels of crude oil petroleum a constituent part of which was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SIXTH COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That H. E. Hines whose first name is to the grand jurors unknown, Neal Powers, and Rene Allred, on or about the seventeenth day of January A. D. 1936, within the aforesaid division, district, and circuit and within the jurisdiction of this Court, did then and there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce, from the Conroe Oil Field in Montgomery County, State of Texas, to a point outside of the State of Texas, to wit: Marcus Hook, Pennsylvania, certain petroleum products to wit: One hundred and six thousand three hundred two
18 and 42/100(106,302.42) barrels of crude oil petroleum, a constituent part of which was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

SEVENTH COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present: That H. E. Hines whose first name is to the grand jurors unknown, Neal Powers and Rene Allred, on or about the first day of February A. D. 1936, within the aforesaid division, district, and circuit and within the jurisdiction of this Court, did then and

there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce, from the Conroe Oil Field in Montgomery County, State of Texas, to a point outside of the State of Texas, to wit: Marcus Hook, Pennsylvania, certain petroleum products, to wit: One hundred and eight thousand, two hundred twenty-nine and 52/100 (108,229.52) barrels of crude oil petroleum, a constituent part of which was produced, transported and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State; contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

EIGHTH COUNT

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present: That H. E. Hines, whose first name is to the grand jurors unknown, Neal Powers and Rene Allred, on or about the twentieth day of February A. D. 1936, within the aforesaid division, district, and circuit and within the jurisdiction of this Court did then and there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce from the Conroe Oil Field in Montgomery County, State of Texas to a point outside of the State of Texas to wit: Marcus Hook, Pennsylvania, certain petroleum products to wit: One Hundred and eight thousand eight hundred thirteen and 19/100 (108,813.19) barrels of crude oil petroleum,
19 a constituent part of which was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

NINTH COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present: That H. E. Hines, whose first name is to the grand jurors unknown, Neal Powers and Rene Allred, on or about the twenty-eighth day of February A. D. 1936, within the aforesaid division, district, and circuit and within the jurisdiction of this Court, did then and there unlawfully, knowingly and feloniously transport and cause to be transported in interstate commerce from the Conroe Oil Field in Montgomery County, State of Texas to a point outside of the State of Texas to wit: Marcus Hook, Pennsylvania, certain petroleum products to wit: One hundred and seven thousand, one hundred fifty four and 87/100 (107,154 87) barrels of crude oil petroleum, a

constituent part of which was produced, transported and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of the State of Texas and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

TENTH COUNT

And the Grand Jurors aforesaid upon their oaths aforesaid do further present: That H. E. Hines whose first name is to the grand jurors unknown, Neal Powers, and Rene Allred, on or about the twentieth day of March A. D. 1936 within the aforesaid division, district, and circuit and within the jurisdiction of this Court, did then and there unlawfully, knowingly, and feloniously transport and cause to be transported in interstate commerce from the Conroe Oil Field in Montgomery County, State of Texas to a point outside of the State of Texas, to wit: Marcus Hook, Pennsylvania, certain petroleum products to wit: One hundred and seven thousand, one hundred forty
20 one and 10/100 (107,141.10) barrels of crude oil petroleum, a constituent part of which was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

RAY FOGLE,
Foreman of Grand Jury.

DOUGLAS W. MCGREGOR,
United States Attorney.
GEORGE P. RED,
Assistant United States Attorney.
WILLIAM W. BARRON,
Special Assistant to the Attorney General.

[Endorsements:] No. 7354 Cr- United States District Court, Southern District of Texas, Houston Division. The United States of America vs. H. E. Hines, Neal Powers, and Rene Allred. Indictment. Conspiracy to vio Sec. 715 (b) Tit. 15 U. S. C. A. as amended, Vio Sec. 88, Tit. 18 U. S. C. A. and unlawfully transporting, etc. in interstate commerce, certain petroleum products, etc. Vio Sec. 715 (b) Tit. 15, U. S. C. A. as amended. A True Bill. Ray Fogle, Foreman.

[File endorsement omitted.]

21 In United States District Court

[Title omitted.]

Demurrer and motion of Neal Powers to dismiss and quash the indictment

Filed Oct. 14, 1938

Now comes the defendant, Neal Powers, and before entering his plea upon arraignment herein files this, his demurrer to the indictment in this cause and his motion to dismiss and quash said indictment, embracing said demurrer and said motions together in this single pleading, and for grounds thereof says:

I

That said indictment shows on its face that this Court has no jurisdiction of the subject matter of said indictment.

II

That said indictment and each and every count thereof does not state facts sufficient to constitute an offense against the United States or the laws thereof.

III

The statute of the United States creating the offense charged in said indictment and under which said indictment was found was not in force at the time said indictment was found and returned.

IV

The Statute of the United States creating the offenses charged in said indictment and under which said indictment was found, and which statute it is charged in Count 1 this defendant conspired
22 to violate and which substantive offenses are charged in Counts 2 to 10, being the Act of 1935, Section 3, and commonly cited as U. S. C. A., Title 15, Section 715b, and ordinarily referred to as the Connally Act of 1935, expired by its own terms on June 16, 1937, without provision therein contained for the continuance thereafter of the penalty therein prescribed as to offenses theretofore committed, and said indictment charges the commission of no offense after March 15, 1937, but said conspiracy was alleged to have commenced on September 4, 1935, and to have continued until March 15, 1937, and the overt acts, being forty-five in number, are dated from August 20, 1935, up to and including April 6, 1936, and the substantive offenses are alleged to have been committed on November 29, 1935, November 4, 1935, December 14, 1935, December 30,

1935, January 17, 1936, February 1, 1936, February 20, 1936, February 28, 1936, and March 20, 1936.

The Act of Congress of June 14, 1937, purporting to extend for an additional period of two years the Connally Act of 1935, and the Statute of the United States creating the offense charged in said indictment which the defendant is alleged to have conspired to have violated, and which is charged to have been violated in the counts charging substantive offenses, in so far as said Act of 1937 purports to or may be construed as to continue the penalties prescribed by said Connally Act of 1935, is an ex post facto law, which would extend and affect an offense or offenses committed in the past and alters the relation of the defendant to said prior offense and its consequences, and alters the situation of said defendant to his disadvantage, and seeks to criminally punish the said defendant under a law prescribed for his government by the sovereign authority after the imputed offense was committed, and which did not exist as a law at the time of the commission of the offense and is in violation of the Constitution of the United States of America and the 5th Amendment thereto and is void.

VI

The Connally Act of June 14th, 1937, purporting to extend for an additional period of two years the original Connally Act
23 of 1935, is to be construed prospectively as applying only to offenses committed after the adoption of said act and under such construction the original Connally Act of 1935 has expired at this time and had expired at the time the indictment in this case was returned on the 17th day of September A. D. 1938, and the law under which said offense was committed not being in force at this time and at the time the indictment was returned no prosecution can be brought for said offense or offenses and any prosecution under said law for said offenses falls.

VII

The effect of the foregoing demurrers and objections to the indictment is not abrogated by any saving clause either in the original Connally Act or in the amendatory and extending act of 1937, nor by any statute or general saving clause of the United States.

VIII

The indictment in this case seeks to charge a conspiracy to violate the Connally Act of 1935 and to charge substantive offenses committed against said act of 1935. Said alleged violations of the law depend upon the shipment in interstate commerce of the contraband oil, which oil is defined as "petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported,

or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a state or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state, or any of the products of such petroleum." Said indictment predicates the offense charged upon the violation or shipment of oil produced in violation of the proration laws of the State of Texas. The Proration Act of the State of Texas of 1935 under which it is charged the oil involved in this indictment was contraband, being the Act of 1935, 44th Legislature, Regular Session, Chapter 76, page 180, and commonly known as 6049c and
24 6049d of Vernon's Texas Statutes 1938, expired under its own terms under Section 20 of said act on September 1, 1937, and is no longer in force and was not in force at the time the indictment in this case was returned. The extension of said Texas act by the amendment of Section 20 of said Act by the Act of 1937, 45th Legislature, Chapter 15, page 17, in so far as it purports to continue the penalties arising for offenses committed under the Act of 1935, is ex post facto and violates the Constitution of the United States of America and the 5th Amendment thereto, and the Constitution of the State of Texas, Article 1, Section 16, and is void.

IX

The Texas Act of 1937, 45th Legislature, Chapter 15, page 17, attempting to extend the Texas Proration Law of 1935 by amending Section 20 thereof, is to be construed prospectively as applying to offenses committed in the future and said act does not support the prosecution of prior offenses committed before the expiration of the original act so as to support an indictment brought after the expiration of said original act and a prosecution pending after the expiration of the original act.

X

The effect of the foregoing construction is not abrogated by any saving clause either in the original Texas Proration Act or in the attempted extension thereof or in any general saving clause under the laws of the State of Texas.

XI

The Statutes of the State of Texas and the orders, rules, and regulations of the Railroad Commission sought to be referred to in said indictment are not in force or effect because the purported and attempted extension of the Proration Act of 1935 by the amendment of Section 20 of said Act by the Act of 1937, 45th Legislature, Chapter 15, page 17, attempted to revive, reenact, and extend the Texas Proration Act of 1935 in its entirety without reenacting the section and sections of said act of 1935 which it was sought to revive and without

reenacting and publishing said act of 1935 at length, and violates Article 3, Section 36, of the Constitution of Texas which reads as follows: "Section 36. No law shall be revived or amended by
25 reference to its title but in such case the act revived or the section or sections amended shall be reenacted and published at length."

XII

The said indictment, and each and every count thereof, fail to charge a violation of an Act of Congress approved on February 25, 1935, Chapter 18, Section 31, 49th Statutes at Large 30, also known as Section 715b, Title 15, U. S. C. A., and commonly called the Connally Act of 1935.

XIII

The Act of February 25, 1935, 49 Statutes at Large 30, Section 715b, Title 15, U. S. C. A., is unconstitutional and void because it is in violation of the Constitution of the United States and the 5th, 9th, and 10th Amendments thereto.

XIV

The indictment in this case does not charge a violation of the Connally Act because the said act under its terms applies to oil or a constituent part thereof that *was produced*, transported, or withdrawn from storage prior to the time the Connally Act went into effect on, to wit, February 22, 1935, and to that oil which was produced, transported, or withdrawn from storage in excess of the amount that was permitted to be produced, transported, or withdrawn from storage by the Statutes of the State of Texas or the rules of the Railroad Commission prescribed thereunder and in existence on said date, and under its terms does not purport to apply to oil produced, transported, or withdrawn from storage in the future in violation of the Statutes of the State of Texas or the rules and regulations of the Railroad Commission to be prescribed thereunder in the future, and it appears from the allegations of the indictment that all of the contraband oil alleged to have been transported in interstate commerce in said indictment was produced, transported, and withdrawn from storage after the passage of said act.

XV

The Connally Act of 1935, by the Act of February 22, 1935,
26 and the extension thereof of June 14, 1937, is invalid because it seeks to delegate to the Legislature of the State of Texas and to the Railroad Commission of the State of Texas and to any board, commission, officer or other duly authorized agency of such state, the power in the future to declare what is federal offense and such statute constitutes an unlawful delegation of the powers of the legislative branch of the government of the United States and of the sovereignty of the United States in violation of the fundametal plan and form of the Constitution of the United States.

XVI

The Connally Act of 1935, being the act of February 22, 1935, and the extension thereof of June 14, 1937, is unconstitutional and void under the 6th Amendment of the Constitution of the United States because said act does not sufficiently define an offense so as to inform the accused in advance of the nature and cause of the accusation with which he is charged or to be charged in that said act leaves to the determination of what shall constitute the offense and the description of the offense, violations of the orders of state boards, commissions, and agencies, of which the defendant and courts are not required to take judicial knowledge and which orders are to be passed and promulgated in the future and which orders the accused is unable to know from the act itself.

XVII

The indictment is wholly insufficient because it appears from the face thereof and from the allegations of the various counts thereof that the conspiracy and several offenses were committed and completed more than three years prior to the returning of the indictment in this case and that the prosecution for said conspiracy and offenses at the time of the bringing of the indictment were barred by the three-year statute of limitations, and there are no exceptions to the limitation statute which would require the raising of this question on a plea of not guilty.

27

XVIII

That said indictment, and each and every count thereof, is so uncertain and indefinite that said indictment does not apprise this defendant of the nature of the crime with which he is charged, and the said indictment, and each and every count thereof, does not set forth the necessary elements of the offense sought to be charged as required by the 6th Amendment to the Constitution of the United States.

XIX

Defendant, Neal Powers, says that said indictment is insufficient, and in particular Count 1, paragraph 2, on page 1 thereof, wherein it is alleged that the conspiracy was formed in the Southern District of Texas and within the jurisdiction of this Court, because the particular time, place, and circumstances under which said agreement and conspiracy was formed are not set out with sufficient definiteness to enable this defendant to prepare his defense.

XX

Defendant says that said indictment, and Count 1 thereof, is insufficient and in particular on page 2 thereof, wherein it is alleged that the defendant violated the Act of February 22, 1935, being Public, No.

14, 74th Congress, because said act has expired and it is not sought to bring the offenses charged under the provisions of the amendment to said act extending the provisions of said act.

XXI

Defendant says that said indictment, and Count 1 thereof, is insufficient and in particular on page 2 thereof, because said indictment does not allege whether the offenses charged were brought under the original act of 1935 or under the amended act.

XXII

Said indictment, and Count 1 thereof, is insufficient, and
28 in particular on page 2 thereof, because it is alleged that the defendants conspired to transport through interstate commerce oil which was produced, transported and withdrawn from storage in excess of the amounts permitted to be produced, which allegations would refer to oil produced prior to the formation of the conspiracy, while the subsequent allegations of the indictment setting forth the overt acts refer to oil produced after the formation of such conspiracy, and said allegations are inconsistent.

XXIII

Said indictment, and Count 1 thereof, is insufficient, and particularly on page 2 thereof, because it is not alleged that this defendant or any of the defendants knew that the oil which was to be transported in interstate commerce was contraband or that said oil had been produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of the State of Texas and under the orders, rules, and regulations of the Railroad Commission of the State of Texas.

XXIV

Said indictment, and Count 1 thereof, and particularly on page 2 thereof, does not allege that the oil transported in interstate commerce was unlawfully, knowlingly, and willfully produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn under the laws of the State of Texas and under the orders, rules, and regulations of the Railroad Commission of the State of Texas.

XXV

Said indictment, and Count 1 thereof, and particularly on page 2 thereof, is insufficient in that it alleges that this defendant and the several conspirators conspired to commit divers, various and sundry offenses against the United States of America, to-wit: conspired to

violate the Connally Act of 1935, and said allegations is duplic-
29 itous if said conspiracy and said Count 1 are based upon a conspiracy to commit more than one offense and if said Count is limited to a conspiracy to violate the Connally Act, then said allegations alleging a conspiracy to commit various and sundry offenses is repugnant to the allegations that the defendants conspired to violate the Connally Act, and said allegation is prejudicial in that it would seek to impress the court and jury with the idea that the defendants had entered into a conspiracy to commit several offenses but that the Government was limiting this prosecution to the conspiracy to commit one offense.

XXVI

Said indictment, and Count 1 thereof, and in particular on page 2 thereof, is insufficient because where said indictment alleges that defendants conspired to violate the Connally Act of 1935 by producing and transporting and withdrawing from storage petroleum which was produced and transported and withdrawn in excess of amounts permitted by the laws of the State of Texas and the orders, rules, and regulations of the Railroad Commission, said acts do not constitute a violation of the Connally Act, and if said allegation can be considered as surplusage said allegation is prejudicial in charging the commission of offenses not prohibited by the Connally Act.

XXVII

Said indictment, and Count 1 thereof, and particularly on pages 2 and 3 thereof, is insufficient because in alleging that the defendants conspired to violate the Connally Act by transporting in interstate commerce oil produced in violation of the Texas laws and the orders of the Railroad Commission of Texas, it is not alleged what specific law of the State of Texas, of which provision or section of the Texas law said oil was produced, transported and withdrawn in violation of, and it is not alleged which rule of the Railroad Commission of the State of Texas and its officers said oil was produced, transported and withdrawn from storage in violation of. That there are many sections of the Texas Proration Law prohibiting and making
30 unlawful various and sundry acts. That there are many and varied rules and regulations of the Railroad Commission of Texas having to do with spacing, proration, storage, production, etc., applying to various oil fields in the State of Texas and to various wells and properties within the same oil field, and said Count and said allegations of said indictment do not state what law and what section of the law and what provision of the law, and which particular rule and regulation of the Railroad Commission was violated in the production of said alleged contraband oil, and this defendant is unable from said indictment to know what statute, rules, and regulations have been violated by the production, transportation, and with-

drawing of the oil from storage which it is alleged this defendant conspired to transport through interstate commerce.

XXVIII

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient because the indictment attempts to allege that certain conspirators did do various and separate acts which it appears constitute separate conspiracies and which are not connected by the allegations of the indictment to the general conspiracy under which the defendants are charged to have conspired to violate the Connally Act by the transporting of contraband oil through interstate commerce.

XXIX

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient wherein it is alleged that certain conspirators did produce oil in excess of that permitted by the laws of the State of Texas and the orders of the Railroad Commission of the State of Texas from two designated leases, because it does not appear in the allegations of said indictment which rules and regulations of the Railroad Commission were to be violated by the production of said oil from said leases, whether spacing rules, proration rules, storage rules, transportation rules, rules requiring certain reports and records, and the defendant is unable to ascertain from said indictment which particular rules and regulations it is intended by said indictment to allege that said oil was to be produced in violation of.

31

XXX

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient insofar as it alleges that certain conspirators were to file false and fraudulent tender, operation statements, monthly pipeline and crude oil storage reports, and monthly producer's reports, because the nature and character of said false and fraudulent statements is not set out and it does not appear how said tender, operation statements, or said pipeline reports or said producer's reports were false and fraudulent, and this defendant is unable to know with what particular false and fraudulent reports he is charged.

XXXI

Said indictment, and Count 1 thereof, and particularly page 3 thereof, is insufficient wherein it is alleged that said conspirators were to forge, procure, and furnish crude oil tenders, because it does not appear from the allegations thereof of what the forgery consisted and what particular tenders were to be forged and whose name was to be forged to said tenders, and because it is not in violation of any rule or regulation of the Railroad Commission of Texas.

to procure and furnish crude oil tenders if said tenders were not false, fraudulent, or forged.

XXXII

Said indictment, and Count 1 thereof, and particularly page 3 thereof, is insufficient wherein it is alleged beginning "certain conspirators were to file false and fraudulent reports" and ending, "which in fact were not valid crude oil tenders form SW3," because it is not alleged that the oil covered by said false and fraudulent reports and by said forged and improper tenders was or was to be in excess of the amount of oil permitted to be produced by the laws of the State of Texas and the rules and regulations of the Railroad Commission of Texas, and it is not a violation of the Connally Act to transport in interstate commerce any oil cov-
32 ered by a false and fraudulent report or by a forged or improper tender unless said oil was in excess of the amount permitted to be produced by the laws of the State of Texas and the orders of the Railroad Commission of the State of Texas.

XXXIII

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient wherein it is alleged that certain conspirators were to transport oil by pipeline to certain docks on the Houston Ship Channel in Harris County, Texas, because such transportation is not an interstate shipment and does not constitute a violation of the laws of the United States and does not constitute a violation of Section 715b, Title 15, U. S. C. A., as alleged in said paragraph of said indictment.

XXXIV

Said indictment, and Count 1 thereof, is insufficient in the allegations of the overt acts, in that none of said overt acts, numbered from 1 to 45, have sufficient allegations nor are there sufficient allegations in the other portions of the indictment to show how said overt acts affected the object and purpose of the conspiracy with which the defendants are charged. All of said overt acts are mere allegations of things alleged to have been done that in themselves are not illegal and which are not, under the allegations of the indictment, necessarily connected with or a part of the alleged conspiracy. Said indictment nowhere states any facts indicating in what respect the overt acts alleged constituted a violation of the law.

XXXV

Said indictment is insufficient in Count 1 thereof as to all the overt acts alleged except 1, 27, 40 and 43, because none of said overt acts are connected with the defendant, Neal Powers, and there are no

allegations in the indictment that seek to connect the said defendant to said overt acts or show how said overt acts in any way were connected with the conspiracy with which the said Neal Powers may have been connected, if he was connected with a conspiracy.

33

XXXVI

Said indictment, and Count 1 thereof, is insufficient wherein an overt act is alleged to have been committed on August 20, 1935, by Neal Powers, Otis H. Gibson, and D. D. Feldman, because said overt act occurred prior to the 4th day of September A. D. 1935, on which date it is alleged the conspiracy commenced and which is the first date on which it is alleged the defendant, Neal Powers, had any connection with such conspiracy.

XXXVII

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the first overt act, because there is no allegation as to who Mark I. Westheimer was and he is not alleged to be a conspirator and could not be included in the designation of those to the grand jury unknown, and it does not appear who the said Mark I. Westheimer was or what effect, if any, it had upon the conspiracy if the said Neal Powers had been successful in persuading the said Westheimer that the said transactions were in all things lawful.

XXXVIII

Said indictment, and Count 1 thereof, is insufficient in the second overt act alleged, wherein it is alleged that the defendants endeavored to secure the consent of the owner of certain royalties to secure permission for the running of more oil than was permitted under the orders of the Railroad Commission because said allegation is indefinite, does not state the amount of oil, does not state what the order of the Railroad Commission was fixing the amount of the allowable oil, and it is not made sufficiently plain which order of the Railroad Commission was sought to be violated.

XXXIX

Said indictment, and Count 1 thereof, is insufficient in the allegations as to the third overt act because it would not be unlawful or in violation of any laws of the State of Texas or of the Railroad Commission to construct the pipeline referred to without the consent and knowledge of the Railroad Commission and the allegation
34 that the construction and completion was secret and clandestine is prejudicial and is an effort to make the court and jury believe that an innocent act was wrongful and fraudulent.

XL

Said indictment, and Count 1 thereof, is insufficient in the allegation of the fourth overt act because said act is wholly lawful and it does not appear that the amount of oil which was contracted to be sold was excess oil or that the purchase and contract to purchase said oil was in any way unlawful.

XLI

Said indictment, and Count 1 thereof, is insufficient in the allegations as to the overt acts numbered 7–20, inclusive, 24–26, inclusive, 32, 36, and 38, because in none of said allegations as to overt acts is it alleged what order of the Railroad Commission or law of the State of Texas said oil was produced in violation of. Said allegations do not set out the legal allowable for oil in the Conroe field nor on said lease in said field, and the allegation that the specific amount of oil alleged to have been produced as contraband oil was contraband is a conclusion and the indictment should state the facts which constituted and rendered such oil contraband oil.

XLII

Said indictment, and Count 1 thereof, is insufficient in the allegation of the twenty-seventh overt act because the contraband oil for which it is alleged M. D. Carter was paid $700.00 is not sufficiently described and there is no allegation showing how said payment for said contraband oil was in any way connected with the conspiracy with which the defendant, Neal Powers, is charged and that no allegation is made that the defendant, Neal Powers, and the defendant, Renne Allred, had any knowledge said money was being paid or for what the payment was being made if it was made, or that said payment was made in carrying out the particular conspiracy alleged.

35 XLIII

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the twenty-eighth overt act because said allegation is indefinite in alleging that a much greater amount of oil than the allowable was produced from said lease during the month of December 1935. Said allegations should state the legal amount permitted under the rules and regulations of the Railroad Commission and the actual amount which was produced.

XLIV

Said indictment, and Count 1 thereof, is insufficient in the allegation of the thirty-fourth overt act wherein it is alleged that a greater amount of oil than the allowable was produced and delivered from said lease during the month of January 1936, because the allegation

is indefinite and said allegation should set out the legal allowable and the actual amount of oil produced during said month.

XLV

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the fortieth overt act because said allegation does not set out the substance of the telephone talk with Renne Allred and does not allege that said telephone talk was in furtherance of the conspiracy and it appears that said act was a perfectly lawful act and the presumption is that it would be lawful in the absence of some express allegation connection with the talk in some way with the conspiracy with which the defendants are charged.

The same objection aforesaid applies to the allegations as to the forty-first and forty-second overt acts.

XLVI

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the forty-third overt act because it appears in the allegations therein that said act could not have in any way contributed to or assisted in the carrying out of the conspiracy but was a mere transaction between certain of the conspirators between themselves and not in furtherance of the general conspiracy and had reference to
36 declarations of the conspirators after the commission of the acts referred to.

XLVII

Said indictment, and Count 1 thereof, is insufficient as to the allegations of the forty-fourth overt act because there is no allegation connecting said act with the conspiracy and it does not appear from said allegation that said act was or could have been in any way connected with or in furtherance of the general conspiracy.

XLVIII

Said indictment, and Count 1 thereof, is insufficient in the allegations as to the forty-fifth overt act because it is not alleged that the 30,000 barrels of hot oil tender had reference to any oil or a part of any oil which was transported in interstate commerce while contraband in nature. That said allegation is a mere isolated transaction attempting to show a violation of a state law in no way connected with the general conspiracy and charges a separate and isolated offense not cognizable by federal law.

XLIX

Said indictment, and Counts 2 to 10 thereof, are insufficient because in none of said counts is it alleged that the defendants knew that the oil alleged to have been transported in interstate commerce or a constitutent part thereof was transported or withdrawn from storage in

excess of the amount permitted to be produced, transported, and withdrawn from storage under the laws of the State of Texas and the orders, rules, and regulations of the Railroad Commission of the State of Texas.

L

Said indictment is insufficient as to Counts 2 to 10 thereof because it is not alleged in any of said counts what particular law or provision of the Texas law or what particular rule, regulation, or order prescribed by the Railroad Commission was violated so as to constitute the oil referred to as contraband oil.

37

LI

Said indictment is insufficient as to Counts 2 to 10 thereof because the allegations therein are indefinite and none of said counts allege the amount or proportion of the oil transported which constituted contraband oil, if any.

LII

Said indictment is insufficient as to Counts 2 to 10 thereof because in none of said counts is it alleged how the oil was transported, either by pipeline, train, or ship, and it is not alleged when said oil was produced or where said oil was produced, or upon what lease said oil was produced, so as to connect the production and transportation of said oil with the violation of any particular rule or decision of the Railroad Commission of the State of Texas.

LIII

Said indictment, and Count 1 thereof, is insufficient because taking the allegations of said indictment as a whole and all of the overt acts alleged in said Count 1, same show that the defendant's agreement, if any, was to produce, transport, and withdraw from storage oil and ship the same in a purely intrastate transaction from the leases referred to the terminal in Houston, Texas, at the Houston Ship Channel, and that said plan and agreement did not contemplate or it is not alleged that it contemplated that said oil should enter into or be transported in interstate commerce, and that there is no allegation that any of the defendants knew or planned that said oil should enter into or be transported in interstate commerce after it came to rest at the Houston Ship Channel.

Wherefore, defendant prays that his demurrers to the indictment be sustained and that said indictment be quashed and dismissed and that this prosecution be dismissed.

This the 14th day of October, A. D. 1938.

Respectfully submitted.

NEAL POWERS,
Defendant.

38 [File endorsement omitted.]

39 In United States District Court

[Title omitted.]

Demurrer and motion of Rene Allred to dismiss and quash the indictment

Filed Oct. 14, 1938

Now comes the defendant, Rene Allred, and before entering his plea upon arraignment herein files this, his demurrer to the indictment in this cause and his motion to dismiss and quash said indictment, embracing said demurrer and said motions together in this single pleading, and for grounds thereof says:

I

That said indictment shows on its face that this court has no jurisdiction of the subject matter of said indictment.

II

That said indictment and each and every count thereof does not state facts sufficient to constitute an offense against the United States or the laws thereof.

III

The statute of the United States creating the offense charged in said indictment and under which said indictment was found was not in force at the time said indictment was found and returned.

IV

The statute of the United States creating the offenses charged in said indictment and under which said indictment was found, and which statute it is charged in Count 1 this defendant conspired to violate and which substantive offenses are charged
40 in Counts 2 to 10, being the Act of 1935, Section 3, and commonly cited as U. S. C. A., Title 15, Section 715b, and ordinarily referred to as the Connally Act of 1935, expired by its own terms on June 16, 1937, without provision therein contained for the continuance thereafter of the penalty therein prescribed as to offenses theretofore committed, and said indictment charges the commission of no offense after March 15, 1937, but said conspiracy was alleged to have commenced on September 4, 1935, and to have continued until March 15, 1937, and the overt acts, being forty-five in number, are dated from August 20, 1935, up to and including April 6, 1936, and the substantive offenses are alleged to have been committed on

November 29, 1935, November 4, 1935, December 14, 1935, December 30, 1935, January 17, 1936, February 1, 1936, February 20, 1936, February 28, 1936, and March 20, 1936.

V

The Act of Congress of June 14, 1937, purporting to extend for an additional period of two years the Connally Act of 1935, and the statute of the United States creating the offense charged in said indictment which the defendant is alleged to have conspired to have violated, and which is charged to have been violated in the counts charging substantive offenses, in so far as said Act of 1937 purports to or may be construed as to continue the penalties prescribed by said Connally Act of 1935, is an ex post facto law, which would extend and affect an offense or offenses committed in the past and alters the relation of the defendant to said prior offense and its consequences, and alters the situation of said defendant to his disadvantage, and seeks to criminally punish the said defendant under a law prescribed for his government by the sovereign authority after the imputed offense was committed, and which did not exist as a law at the time of the commission of the offense and is in
41 violation of the Constitution of the United States of America and the 5th Amendment thereto and is void.

VI

The Connally Act of June 14th, 1937, purporting to extend for an additional period of two years the original Connally Act of 1935, is to be construed prospectively as applying only to offenses committed after the adoption of said act and under such construction the original Connally Act of 1935 has expired at this time and had expired at the time the indictment in this case was returned on the 17th day of September A. D. 1938, and the law under which said offense was committed not being in force at this time and at the time the indictment was returned no prosecution can be brought for said offense or offenses and any prosecution under said law for said offenses falls.

VII

The effect of the foregoing demurrers and objections to the indictment is not abrogated by any saving clause either in the original Connally Act or in the amendatory and extending act of 1937, nor by any statute or general saving clause of the United States.

VIII

The indictment in this case seeks to charge a conspiracy to violate the Connally Act of 1935 and to charge substantive offenses committed against said act of 1935. Said alleged violations of the law depend upon the shipment in interstate commerce of the contraband

oil, which oil is defined as "petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a state or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state, or any
42 of the products of such petroleum." Said indictment predicates the offense charged upon the violation or shipment of oil produced in violation of the proration laws of the State of Texas. The Proration Act of the State of Texas of 1935 under which it is charged the oil involved in this indictment was contraband, being the Act of 1935, 44th Legislature, Regular Session, Chapter 76, page 180, and commonly known as 6049c and 6049d of Vernon's Texas Statutes 1938, expired under its own terms under Section 20 of said act on September 1, 1937, and is no longer in force and was not in force at the time the indictment in this case was returned. The extension of said Texas act by the amendment of Section 20 of said Act by the Act of 1937, 45th Legislature, Chapter 15, page 17, insofar as it purports to continue the penalties arising for offenses committed under the Act of 1935, is ex post facto and violates the Constitution of the United States of America and the 5th Amendment thereto, and the Constitution of the State of Texas, Article 1, Section 16, and is void.

IX

The Texas Act of 1937, 45th Legislature, Chapter 15, page 17, attempting to extend the Texas Proration Law of 1935 by amending Section 20 thereof, is to be construed prospectively as applying to offenses committed in the future and said act does not support the prosecution of prior offenses committed before the expiration of the original act so as to support an indictment brought after the expiration of said original act and a prosecution pending after the expiration of the original act.

X

The effect of the foregoing construction is not abrogated by any saving clause either in the original Texas Proration Act or in the attempted extension thereof or in any general saving clause under the laws of the State of Texas.

XI

The Statutes of the State of Texas and the orders, rules,
43 and regulations of the Railroad Commission sought to be referred to in said indictment are not in force or effect because the purported and attempted extension of the Proration Act of 1935 by the amendment of Section 20 of said Act by the Act of 1937, 45th Legislature, Chapter 15, page 17, attempted to revive, re-enact and extend the Texas Proration Act of 1935 in its entirety without re-enacting the

section and sections of said act of 1935 which it was sought to revive and without re-enacting and publishing said Act of 1935 at length, and violates Article 3, Section 36, of the Constitution of Texas which reads as follows: "Section 36. No law shall be revived or amended by reference to its title but in such case the act revived or the section or sections amended shall be re-enacted and published at length."

XII

The said indictment, and each and every count thereof, fail to charge a violation of an Act of Congress approved on February 25, 1935, Chapter 18, Section 31, 49th Statutes at Large 30, also known as Section 715b, Title 15, U. S. C. A., and commonly called the Connally Act of 1935.

XIII

The Act of February 25, 1935, 49 Statutes at Large 30, Section 715b, Title 15, U. S. C. A., is unconstitutional and void because it is in violation of the Constitution of the United States and the 5th, 9th and 10th Amendments thereto.

XIV

The indictment in this case does not charge a violation of the Connally Act because the said act under its terms applies to oil or a constituent part thereof that *was produced*, transported, or withdrawn from storage prior to the time the Connally Act went into effect on, to-wit, February 22, 1935, and to that oil which was produced, transported or withdrawn from storage in excess of the amount that was permitted to be produced, transported, or withdrawn from stor-
44 age by the Statutes of the State of Texas or the rules of the Railroad Commission prescribed thereunder and in existence on said date, and under its terms does not purport to apply to oil produced, transported or withdrawn from storage in the future in violation of the Statutes of the State of Texas or the rules and regulations of the Railroad Commission to be prescribed thereunder in the future, and it appears from the allegations of the indictment that all of the contraband oil alleged to have been transported in interstate commerce in said indictment was produced, transported and withdrawn from storage after the passage of said act.

XV

The Connally Act of 1935, by the Act of February 22, 1935, and the extension thereof of June 14, 1937, is invalid because it seeks to delegate to the Legislature of the State of Texas and to the Railroad Commission of the State of Texas and to any board, commission, officer, or other duly authorized agency of such state, the power in the future to declare what is a federal offense and such statute constitutes an

unlawful delegation of the powers of the legislative branch of the government of the United States and of the sovereignty of the United States in violation of the fundamental plan and form of the Constitution of the United States.

XVI

The Connally Act of 1935, being the act of February 22, 1935, and the extension thereof of June 14, 1937, is unconstitutional and void under the 6th Amendment of the Constitution of the United States because said act does not sufficiently define an offense so as to inform the accused in advance of the nature and cause of the accusation with which he is charged or to be charged in that said act leaves to the determination of what shall constitute the offense and the description of the offense, violations of the orders of state boards, commissions, and agencies, of which the defendant and courts are not required to take judicial knowledge and which orders are to be passed and promulgated in the future and which orders the accused is unable to know from the act itself.

XVII

The indictment is wholly insufficient because it appears from the face thereof and from the allegations of the various counts thereof that the conspiracy and several offenses were committed and completed more than three years prior to the returning of the indictment in this case and that the prosecution for said conspiracy and offenses at the time of the bringing of the indictment were barred by the three-year statute of limitations, and there are no exceptions to the limitation statute which would require the raising of this question on a plea of not guilty.

XVIII

That said indictment, and each and every count thereof, is so uncertain and indefinite that said indictment does not apprise this defendant of the nature of the crime with which he is charged, and the said indictment, and each and every count thereof, does not set forth the necessary elements of the offense sought to be charged as required by the 6th Amendment to the Constitution of the United States.

XIX

Defendant Rene Allred says that said indictment is insufficient, and in particular Count 1, paragraph 2, on page 1 thereof, wherein it is alleged that the conspiracy was formed in the Southern District of Texas and within the jurisdiction of this court, because the particular time, place, and circumstances under which said agreement and conspiracy was formed are not set out with sufficient definiteness to enable this defendant to prepare his defense.

XX

Defendant says that said indictment, and Count 1 thereof, is
46 insufficient and in particular on page 2 thereof, wherein it is alleged that the defendant violated the Act of February 22, 1935, being Public No. 14, 74th Congress, because said act has expired and it is not sought to bring the offenses charged under the provisions of the amendment to said act extending the provisions of said act.

XXI

Defendant says that in said indictment, and Count 1 thereof, is insufficient and in particular on page 2 thereof, because said indictment does not allege whether the offenses charged were brought under the original act of 1935 or under the amended act.

XXII

Said indictment, and Count 1 thereof, is insufficient, and in particular on page 2 thereof, because it is alleged that the defendants conspired to transport through interstate commerce oil which *was produced*, transported, and withdrawn from storage in excess of the amounts permitted to be produced, which allegations would refer to oil produced prior to the formation of the conspiracy, while the subsequent allegations of the indictment setting for the overt acts refer to oil produced after the formation of such conspiracy, and said allegations are inconsistent.

XXIII

Said indictment, and Count 1 thereof, is insufficient, and particularly on page 2 thereof, because it is not alleged that this defendant or any of the defendants knew that the oil which was to be transported in interstate commerce was contraband or that said oil had been produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported and withdrawn from storage under the laws of the State of Texas and under the orders, rules, and regulations of the Railroad Commission of the State of Texas.

XXIV

Said indictment, and Count 1 thereof, and particularly
47 on page 2 thereof does not allege that the oil transported in interstate commerce was unlawfully, knowingly, and willfully produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn under the laws of the State of Texas and under the orders, rules, and regulations of the Railroad Commission of the State of Texas.

XXV

Said indictment, and Count 1 thereof, and particularly on page 2 thereof, is insufficient in that it alleges that this defendant and the several conspirators conspired to commit divers, various and sundry offenses against the United States of America, to-wit, conspired to violate the Connally Act of 1935, and said allegation is duplicitous if said conspiracy and said Count 1 are based upon a conspiracy to commit more than one offense and if said Count is limited to a conspiracy to violate the Connally Act, then said allegations alleging a conspiracy to commit various and sundry offenses is repugnant to the allegation that the defendants conspired to violate the Connally Act, and said allegation is prejudicial in that it would seek to impress the court and jury with the idea that the defendants had entered into a conspiracy to commit several offenses but that the Government was limiting this prosecution to the conspiracy to commit one offense.

XXVI

Said indictment, and Count 1 thereof, and in particular on page 2 thereof, is insufficient because where said indictment alleges that defendants conspired to violate the Connally Act of 1935 by producing and transporting and withdrawing from storage petroleum which was produced and transported and withdrawn in excess of amounts permitted by the laws of the State of Texas and the orders, rules, and regulations of the Railroad Commission, said acts do not constitute a violation of the Connally Act, and if said allegation
48 can be considered as surplusage said allegation is prejudicial in charging the commission of offenses not prohibited by the Connally Act.

XXVII

Said indictment, and Count 1 thereof, and particularly on pages 2 and 3 thereof, is insufficient because in alleging that the defendants conspired to violate the Connally Act by transporting in interstate commerce oil produced in violation of the Texas laws and the orders of the Railroad Commission of Texas, it is not alleged what specific law of the State of Texas, or which provision or section of the Texas law said oil was produced, transported, and withdrawn in violation of, and it is not alleged which rule of the Railroad Commission of the State of Texas and its officers said oil was produced, transported, and withdrawn from storage in violation of. That there are many sections of the Texas Proration Law prohibiting and making unlawful various and sundry acts. That there are many and varied rules and regulations of the Railroad Commission of Texas having to do with spacing, proration, storage, production, etc., applying to various oil fields in the State of Texas and to various wells and properties within the same oil field, and said Count and said allegations of said indictment do not state what law and what section of the law and what

provision of the law, and which particular rule and regulation of the Railroad Commission was violated in the production of said alleged contraband oil, and this defendant is unable from said indictment to know what statute, rules, and regulations have been violated by the production, transportation, and withdrawing of the oil from storage which it is alleged this defendant conspired to transport through interstate commerce.

XXVIII

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient because the indictment attempts to allege that certain conspirators did do various and separate acts which it
49 appears constitute separate conspiracies and which are not connected by the allegations of the indictment to the general conspiracy under which the defendants are charged to have conspired to violate the Connally Act by the transporting of contraband oil through interstate commerce.

XXIX

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient wherein it is alleged that certain conspirators did produce oil in excess of that permitted by the laws of the State of Texas and the orders of the Railroad Commission of the State of Texas from two designated leases, because it does not appear in the allegations of said indictment which rules and regulations of the Railroad Commission were to be violated by the production of said oil from said leases, whether spacing rules, proration rules, storage rules, transportation rules, rules requiring certain reports and records, and the defendant is unable to ascertain from said indictment which particular rules and regulations it is intended by said indictment to allege that said oil was to be produced in violation of.

XXX

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient in so far as it alleges that certain conspirators were to file false and fraudulent tender, operation statements, monthly pipeline and crude oil storage reports and monthly producer's reports, because the nature and character of said false and fraudulent statements is not set out and it does not appear how said tender, operation statements or said pipeline reports or said producer's reports were false and fraudulent, and this defendant is unable to know with what particular false and fraudulent reports he is charged.

XXXI

Said indictment, and Count 1 thereof, and particularly page 3
50 thereof, is insufficient wherein it is alleged that said conspirators were to forge, procure, and furnish crude oil tenders, because

it does not appear from the allegations thereof of what the forgery consisted and what particular tenders were to be forged and whose name was to be forged to said tenders, and because it is not in violation of any rule or regulation of the Railroad Commission of Texas to procure and furnish crude oil tenders if said tenders were not false, fraudulent, or forged.

XXXII

Said indictment, and Count 1 thereof, and particularly page 3 thereof, is insufficient wherein it is alleged beginning "certain conspirators were to file false and fraudulent reports" and ending, "which in fact were not valid crude oil tenders form SW3," because it is not alleged that the oil covered by said false and fraudulent reports and by said forged and improper tenders was or was to be in excess of the amount of oil permitted to be produced by the laws of the State of Texas and the rules and regulations of the Railroad Commission of Texas, and it is not a violation of the Connally Act to transport in interstate commerce any oil covered by a false and fraudulent report or by a forged or improper tender unless said oil was in excess of the amount permitted to be produced by the laws of the State of Texas and the orders of the Railroad Commission of the State of Texas.

XXXIII

Said indictment, and Count 1 thereof, and particularly on page 3 thereof, is insufficient wherein it is alleged that certain conspirators were to transport oil by pipeline to certain docks on the Houston Ship Channel in Harris County, Texas, because such transportation is not an interstate shipment and does not constitute a violation of the laws of the United States and does not constitute a violation of Section 715b, Title 15, U. S. C. A., as alleged in said paragraph of said indictment.

51

XXXIV

Said indictment, and Count 1 thereof, is insufficient in the allegations, of the overt acts, in that none of said overt acts, numbered from 1 to 45, have sufficient allegations nor are there sufficient allegations in the other portions of the indictment to show how said overt acts affected the object and purpose of the conspiracy with which the defendants are charged. All of said overt acts are mere allegations of things alleged to have been done that in themselves are not illegal and which are not, under the allegations of the indictment, necessarily connected with or a part of the alleged conspiracy. Said indictment nowhere states any facts indicating in what respect the overt acts alleged constituted a violation of the law.

XXXV

Said indictment is insufficient in Count 1 thereof as to all the overt acts alleged except 39, 40, 41, and 42, because none of said overt acts are connected with the defendant, Rene Allred, and there are no allegations in the indictment that seek to connect the said defendant to said overt acts or show how said overt acts in any way were connected with the conspiracy with which the said Rene Allred may have been connected, if he was connected with a conspiracy.

XXXVI

Said indictment, and Count 1 thereof, is insufficient wherein an overt act is alleged to have been committed on August 20, 1935, by Neal Powers, Otis H. Gibson, and D. D. Feldman, because said overt act occurred prior to the 4th day of September A. D. 1935, on which date it is alleged the conspiracy commenced and which is the first date on which it is alleged the defendant Rene Allred had any connection with such conspiracy, and if said conference on said August 20, 1935, was preliminary to said conspiracy it is not alleged that the defendant Rene Allred had any knowledge of such meeting and he could not be bound by the acts of the parties at said meeting.

52

XXXVII

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the first overt act, because there is no allegation as to who Mark I. Westheimer was and he is not alleged to be a conspirator and could not be included in the designation of those to the grand jury unknown, and it does not appear who the said Mark I. Westheimer was or what effect, if any, it had upon the conspiracy if the said Neal Powers had been successful in persuading the said Westheimer that the said transactions were in all things lawful.

XXXVIII

Said indictment, and Count 1 thereof, is insufficient in the second overt act alleged, wherein it is alleged that the defendants endeavored to secure the consent of the owner of certain royalties to secure permission for the running of more oil than was permitted under the orders of the Railroad Commission because said allegation is indefinite, does not state the amount of oil, does not state what the order of the Railroad Commission was fixing the amount of the allowable oil, and it is not made sufficiently plain which order of the Railroad Commission was sought to be violated.

XXXIX

Said indictment, and Count 1 thereof, is insufficient in the allegations as to the third overt act because it would not be unlawful or in

violation of any laws of the State of Texas or of the Railroad Commission to construct the pipeline referred to without the consent and knowledge of the Railroad Commission and the allegation that the construction and completion was secret and clandestine is prejudicial and is an effort to make the court and jury believe that an innocent act was wrongful and fraudulent.

XL

53 Said indictment, and Count 1 thereof, is insufficient in the allegation of the fourth overt act because said act is wholly lawful and it does not appear that the amount of oil which was contracted to be sold was excess oil or that the purchase and contract to purchase said oil was in any way unlawful.

XLI

Said indictment, and Count 1 thereof, is insufficient in the allegations as to the overt acts numbered 7–20, inclusive, 24–26, inclusive, 32, 36, and 38, because in none of said allegations as to overt acts is it alleged what order of the Railroad Commission or law of the State of Texas said oil was produced in violation of. Said allegations do not set out the legal allowable for oil in the Conroe field nor on said lease in said field, and the allegation that the specific amount of oil alleged to have been produced as contraband oil was contraband is a conclusion and the indictment should state the facts which constituted and rendered such oil contraband oil.

XLII

Said indictment, and Count 1 thereof, is insufficient in the allegation of the twenty-seventh overt act because the contraband oil for which it is alleged N. B. Carter was paid $700.00 is not sufficiently described and there is no allegation showing how said payment for said contraband oil was in any way connected with the conspiracy with which the defendant Rene Allred is charged and that no allegation is made that the defendant Rene Allred and the defendant Neal Powers had any knowledge said money was being paid or for what the payment was being made if it was made, or that said payment was made in carrying out the particular conspiracy alleged.

XLIII

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the twenty-eighth overt act because said allegation is indefiinite in alleging that a much greater amount of oil than
54 the allowable was produced from said lease during the month of December 1935. Said allegations should state the legal amount permitted under the rules and regulations of the Railroad Commission and the actual amount which was produced.

XLIV

Said indictment, and Count 1 thereof, is insufficient in the allegation of the 34th overt act wherein it is alleged that a greater amount of oil than the allowable was produced and delivered from said lease during the month of January 1936, because the allegation is indefinite and said allegation should set out the legal allowable and the actual amount of oil produced during said month.

XLV

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the fortieth overt act because said allegation does not set out the substance of the telephone talk with Rene Allred and does not allege that said telephone talk was in furtherance of the conspiracy and it appears that said act was a perfectly lawful act and the presumption is that it would be lawful in the absence of some express allegation connection the talk in some way with the conspiracy with which the defendants are charged.

The same objection aforesaid applies to the allegations as to the forty-first and forty-second overt acts.

XLVI

Said indictment, and Count 1 thereof, is insufficient as to the allegation of the forty-third overt act because it appears in the allegations therein that said act could not have in any way contributed to or assisted in the carrying out of the conspiracy but was a mere transaction between certain of the conspirators between themselves and not in furtherance of the general conspiracy and had reference to declarations of the conspirators after the commission of the acts referred to.

XLVII

55 Said indictment, and Count 1 thereof, is insufficient as to the allegations of the forty-fourth overt act because there is no allegation connecting said act with the conspiracy and it does not appear from said allegation that said act was or could have been in any way connected with or in furtherance of the general conspiracy.

XLVIII

Said indictment, and Count 1 thereof, is insufficient in the allegations as to the forty-fifth overt act because it is not alleged that the 30,000 barrels of hot oil tender had reference to any oil or a part of any oil which was transported in interstate commerce while contraband in nature. That said allegation is a mere isolated transaction attempting to show a violation of a state law in no way

connected with the general conspiracy and charges a separate and isolated offense not cognizable by federal law.

XLIX

Said indictment, and Counts 2 to 10 thereof, are insufficient because in none of said counts is it alleged that the defendants knew that the oil alleged to have been transported in interstate commerce or a constituent part thereof was transported or withdrawn from storage in excess of the amount permitted to be produced, transported and withdrawn from storage under the laws of the State of Texas and the orders, rules, and regulations of the Railroad Commission of the State of Texas.

L

Said indictment is insufficient as to Counts 2 to 10 thereof because it is not alleged in any of said counts what particular law or provision of the Texas law or what particular rule, regulation, or order prescribed by the Railroad Commission was violated so as to constitute the oil referred to as contraband oil.

LI

56 Said indictment is insufficient as the Counts 2 to 10 thereof because the allegations therein are indefinite and none of said counts allege the amount or proportion of the oil transported which constituted contraband oil, if any.

LII

Said indictment is insufficient as to Counts 2 to 10 thereof because in none of said counts is it alleged how the oil was transported, either by pipeline, train, or ship, and it is not alleged when said oil was produced or where said oil was produced, or upon what lease said oil was produced, so as to connect the production and transportation of said oil with the violation of any particular rule or decision of the Railroad Commission of the State of Texas.

LIII

Said indictment, and Count 1 thereof, is insufficient because taking the allegations of said indictment as a whole and all of the overt acts alleged in said Count 1, same show that the defendant's agreement, if any, was to produce, transport, and withdraw from storage oil and ship the same in a purely intrastate transaction from the leases referred to the terminal in Houston, Texas, at the Houston Ship Channel, and that said plan and agreement did not contemplate or it is not alleged that it contemplated that said oil should enter into or be transported in interstate commerce, and that there is no

allegation that any of the defendants knew or planned that said oil should enter into or be transported in interstate commerce after it came to rest at the Houston Ship Channel.

Wherefore, defendant prays that his demurrers to the indictment be sustained and that said indictment be quashed and dismissed and that this prosecution be dismissed.

This the 14th day of October, A. D. 1938.

Respectfully submitted.

E. A. SIMPSON,
Amarillo, Texas.

57 ELBERT HOOPER,
Austin, Texas.
MYRON G. BLALOCK,
Marshall, Texas.
CLARENCE LOHMAN,
Houston, Texas.
JACK BLALOCK,
Houston, Texas.
ROBERT E. COFER,
JOHN D. COFER,
Austin, Texas.

[File endorsement omitted.]

58 In United States District Court for the Southern District of Texas, Houston Division

Cr. No. 7354

UNITED STATES OF AMERICA, PLAINTIFF

vs.

H. E. HINES, NEAL POWERS, RENE ALLRED, DEFENDANTS

Wm. W. Barron, Special Assistant to the Attorney General, Washington, D. C., for United States of America. E. A. Simpson, of Amarillo, Texas; Elbert Hooper, of Austin, Texas; Robert E. Cofer, of Austin, Texas; John D. Cofer, of Austin, Texas; Myron G. Blalock, of Marshall, Texas; Jack Blalock, of Houston, Texas; and Clarence Lohman, of Houston, Texas; for Defendants Neal Powers and Rene Allred.

Opinion

Filed January 4, 1939

KENNERLY, District Judge: This is a case arising under an Act of Congress approved and effective February 22, 1935, and expiring June 16, 1937, regulating the Interstate Transportation of Petroleum Products, and generally known as the Connally Act (49 Stat. 30, Sections 715 to 715 (1) of Title 15, U. S. C. A.), and an Act of Congress approved and effective June 14, 1937, continuing the Connally Act

in force until June 30, 1939 (50 Stat. 257, Sections 715 to 715 (1) of Title 15, U. S. C. A.). For convenience, the Act of February 22, 1935, is referred to as the First Connally Act or as the First Act, and the Act of June 16, 1937, as the Second Connally Act or the Second Act.

This is the third criminal prosecution in this Court under such Acts. In the first case (No. 6894, United States v. Gibson et al.), the Indictment was filed against a large number of Defendants, and the case disposed of as to all except three or four of them while the First Act was still in effect. As to the remaining three or four defendants, it was dismissed by the Government after the Second Act became effective. In the second case (No. 7016, United States v. Gibson etal.), the Indictment was filed against several defendants after the Second Act became effective and all defendants without questioning the Indictment entered pleas of guilty except one, and the case was dismissed by the Government against that one.

In this case, Defendants Allred and Powers are charged by Indictment filed September 17, 1938, with Conspiracy (Section 88, Title 18, U. S. C. A.) to violate such Acts and with violations of such
59 Acts, and have demurred to and moved to quash and dismiss the indictment and this is a hearing on such Demurrer and Motion.

1. Defendants say that the particular thing or things claimed to have been done by them are not so set forth in the Indictment as to inform them of the nature and character of the charge against them, in that while they are charged under such Acts with conspiring to transport and transporting in interstate commerce contraband oil within the meaning of such Acts, i. e., petroleum produced, transported, or withdrawn from storage in violation of the Laws of Texas and the regulations and orders of the Railroad Commission of Texas, the Indictment does not set forth the particular Law, Regulation, or Order violated and does not show such Law, Regulation, or Order to have been valid. And that the Indictment does not set forth the amount of oil so produced, where and by whom produced, the circumstances of production, etc.

The Conspiracy Count sets forth the names of the alleged conspirators (so far as known to the Grand Jury), the time during which the conspiracy existed, the plan to transport contraband oil in interstate commerce, i. e., from the Conroe Field in Montgomery County, in the State of Texas, by a route named to Marcus Hook, in the State of Pennsylvania, the manner in which such oil was or was to be gathered preparatory to transportation, and the property or lease on which such oil, or some of it, was to be and was produced. It is set forth that the conspiracy was formed:

"to commit divers, various, and sundry offenses against the United States of America, to-wit:

"(a) To unlawfully and knowingly violate the laws of the United States, in particular an Act of Congress approved February 22, 1935,

being Public, No. 14, 74th Congress, and entitled 'An Act to regulate interstate and Foreign Commerce in Petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of the State laws and for other purposes' (as amended) by producing, transporting, and withdrawing from storage petroleum, which, or a constituent part of which, was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of the State of Texas, and under the regulations and orders prescribed thereunder by the Railroad Commission of the State of Texas, and its officers, by producing oil in excess of the allowed oil, as provided by the orders of the Railroad Commission," etc.

There are set forth 45 separate and distinct Overt Acts.

The Substantive counts in the Indictment each sets forth the date of the alleged offense, the transportation of contraband oil in Interstate Commerce, i. e., from Conroe Oil Field in Montgomery County, in Texas, to Marcus Hook, in the State of Pennsylvania, the quantity transported, and that such oil, or a constituent part thereof:

'was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State."

On demurrer and motion to quash the Indictment and on these particular complaints urged against it, I think the Indictment must be sustained. Whether Defendants may require the Government, by Bill of Particulars, to be more specific with respect thereto is not before me.

It is clear also that the Overt Acts in the Conspiracy Count are sufficient. It need not be shown in the Indictment, as Defendants contend, in what manner such Overt Acts were connected with the alleged conspiracy, nor is it necessary that such acts be unlawful within themselves.

It is likewise clear that the Indictment, both in the Conspiracy Count and in the Substantive Counts, sufficiently sets forth that Defendants knowingly did the different acts and things they are charged with doing.

2. Defendants also contend that the Acts apply to Oil, etc., produced prior to their enactment, and not to that thereafter produced.

This question was before the Court and disposed of, and I think correctly disposed of, in United States v. Gibson et al.; decided May 21, 1937. It was there said:

"It is also said that the Connally Act is only applicable to oil produced, etc., before the effective date of such Act (February 22, 1935), and in violation of Laws and Regulations of Texas in existence and in force prior to such effective date (February 22, 1935).

"The portion of Section 715b under which the Indictment is drawn is as follows:

"'The shipment or transportation in interstate commerce from any State of contraband oil produced in such State is hereby prohibited.'

"Contraband Oil is defined by Section 715a as follows:—

"'The term "contraband oil" means petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State, or any of the products of such petroleum.'

"And is further defined in Section 715b:

"'For the purposes of this section contraband oil shall not be deemed to have been produced in a State if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State.'"

61 "It is plain that what is prohibited is transportation in Interstate Commerce of contraband oil produced both before and after the effective date of the Act, and under Laws and Regulations in existence and in force both before and after such effective date."

3. Defendants bring forward many contentions with respect to the constitutional validity of the Acts. In President of the United States v. Artex Refineries Sales Corporation, 11 Fed. Supp. 189, this Court said:

"Defendants, by their motion to dismiss, attack the constitutional validity of the Connally Act. I think that question must be regarded as settled in this (Fifth) circuit against defendants' contention by the ruling of the Circuit Court of Appeals, in passing upon the validity of Section 9 of the National Industrial Recovery Act (Section 709, Title 15, U. S. C. A.), in the Ryan and Panama Cases (Ryan v. Amazon Petroleum Corporation, 71 F. (2d) 1, 2; Ryan v. Panama Refining Co., 71 F. (2d) 8), which ruling this court deems it proper to follow."

Several subsequent decisions support this view. I adhere to the ruling there made and uphold the constitutional validity of both Acts as against the contentions of Defendants now made.

4. Count One of the Indictment charges a conspiracy to violate such Acts beginning September 4, 1935, and existing until March 15, 1937, and the Substantive Counts charge violations of such Acts on and between November 4, 1935, and March 20, 1936. All are alleged to have been between September 4, 1935, and March 15, 1937, at a time when the production, transportation, etc., of petroleum oil was controlled and regulated in Texas by Title 102 of Vernon's Civil

Statutes of Texas (Texas Revised Civil Statutes of 1925 and Amendments), and particularly Articles 6049c and 6049d of Vernon's Statute regarding Proration (Act of 44th Texas Legislature of 1935, Ch. 76, p. 180), Section 20 of which provided that the provisions of such Act should end and terminate September 1, 1937.

The 45th Texas Legislature in 1937 passed an Act providing that the provisions of the Act of 1935 should end and terminate September 1, 1939.

Defendants say that this Indictment and this prosecution under the Connally Acts must fall because neither in the Texas Act of 1935 nor in the Texas Act of 1937 is there to be found a saving clause as to violations of or penalties arising under the Texas Act of 1935, and that if there be a saving clause in the Texas Act of 1937, it is retroactive, etc. The questions are interesting ones, and perhaps serious ones, but in view of the next question which Defendants raise
62 and the disposition thereof, it does not seem necessary to decide them.

While the Indictment is drawn under both the First Connally Act (in force from February 22, 1935, to June 16, 1937) and the Second Connally Act (in force from June 14, 1937, to June 30, 1939), it clearly appears that all violations charged against Defendants are of the First Act.

Defendants contend that since neither the First Act nor the Second Act contains a saving clause, and the Second Act is silent as to the Indictment and prosecution of persons charged with violating the First Act, Defendants cannot, since the expiration of the First Act, be lawfully prosecuted for violation thereof, and that the Indictment should be quashed and the case dismissed.

The general and well-settled rule is stated in The Irresistible (7 Wheat (U. S.) 551; 5 L. E. 520) [Italics mine]:

"This is an appeal from a sentence of the circuit court of the United States for the district of Maryland, dismissing an information filed in that court against the brig 'La Irresistible,' as forfeited, under the acts of congress made for the preservation of the neutrality of the United States. The offence charged in the information, was committed under the act of 1817, and the only question is, whether the information can be sustained, after the time when that act would have expired by its own limitation?

"The act was to continue in force two years after the 3d of March, 1817. On the 20th of April, 1818, congress passed an act making further provision on the same subject, which repealed all former acts on that subject, and among these the act of 1817; and annexed to the repealing clause the following proviso, 'Provided, nevertheless, that persons having offended against any of the acts aforesaid may be prosecuted, convicted, and punished, as if the same were not repealed, and no forfeiture heretofore incurred by a violation of any of the acts aforesaid shall be affected by such repeal.' The obvious construction of this clause is, that the power to prosecute, convict, and

punish offenders against either of the repealed acts, remains as if the repealing act had never been passed. It does not create a power to punish, but preserves that which before existed. *Now, it is well settled, that an offence against a temporary act cannot be punished, after the expiration of the act, unless a particular provision be made by law for the purpose.*"

See also U. S. v. Tynan, 11 Wallace 88; 20 L. E. 153; Yeaten v. U. S.; 5 Cranch 281; 3 L. Ed. 101.

The question for determination is whether particular provision has been made by law for the indictment and prosecution of persons who may have violated the First Act, which expired as stated June 16, 1937.

The Second Act is as follows:

"An Act to continue in effect until June 30, 1939, the Act
63 entitled 'An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,' approved February 22, 1935.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 of the Act entitled 'An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,' approved February 22, 1935, is amended by striking out 'June 16, 1937,' and inserting in lieu thereof 'June 30, 1939.'"

"Approved, June 14, 1937."

As Defendants insist, it is silent on the question of the prosecution of those who may have violated the First Act. It simply changes the date of expiration of the First Act from June 16, 1937, to June 30, 1939. Those who violated the First Act were only guilty of a misdemeanor. It was passed in aid of the laws of the States regulating a perfectly legitimate business—the production of petroleum oil. It was by its own terms temporary, indicating that changing conditions in the production of petroleum oil, or changes in the laws of the States regulating such production, or other reason would make it in the public interest for it to terminate. There were no provisions therein for the prosecution after its expiration of those who had violated it before such expiration.

The last violation of the First Act, as charged in the substantive counts of the Indictment, is alleged to have occurred March 20, 1936, more than a year before the expiration date of the First Act, more than a year before the effective date of the Second Act, and nearly two and one-half years before the filing of the Indictment. The Indictment was filed nearly one and one-half years after the alleged t[illegible]mination of the Conspiracy charged in Count One.

Viewing the matter from all standpoints, I think it must be held that there is and can be no certainty that Congress, by passing the Second Act, intended to preserve the right of the Government to prosecute violations of the First Act.

But, citing Schench v. United States, 249 U. S. 47, 63 L. Ed. 473, and other cases, the Government insists that the mere passage of the Second Act is sufficient evidence of the intent of Congress that those who had violated the First Act should be prosecuted. I
64 find no case that it seems to me goes so far. The most that can be said with respect to the Second Act is that it provides for the prosecution of violations occurring after its effective date (June 14, 1937) and prior to the date of its expiration (June 30, 1939). Kring v. State of Missouri, 17 Otto, 221, 107 U. S. 231, 27 L. Ed. 509, 2 S. Ct. 451. Murray v. Gibson, 15 How. (U. S.) 421, 14 L. Ed. 755. Brewster v. Gage, 280 U. S. 338, 74 L. Ed. 457, 463. United States v. St. Louis, S. F. & T. R. Co., 270 U. S. 1, 70 L. Ed. 435. Russell v. United States, 278 U. S. 181, 73 L. Ed. 255. Chew Heong v. United States, 112 U. S. 536, 28 L. Ed. 770.

The Government also says that Section 29, Title 1, U. S. C. A., provides the necessary provision respecting prosecutions of violations of the First Act. This reads as follows [italics mine]:

"The *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

An examination of the common law rule, and of the history of this section and its wording, is convincing that it has no application to temporary Acts such as was the First Act, but only to *repeals*. There must be a plain provision with respect to Temporary Acts. Nothing appears in Great Northern Railway Co. v. United States, 208 U. S. 459, 52 L. Ed. 573. Hertz v. Woodman, 218 U. S. 212, 54 L. Ed. 1005, and other cases cited by the Government, contrary to this view, and there is much to be found in The Irresistable, 7 Wheat. (U. S.) 551, 5 L. Ed. 520; United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. Ed. 255; United States v. Curtiss-Wright Export Corp., 14 Fed. Supp. 230; Missouri-Pac. R. Co. v. United States, 16 Fed. Supp. 752 (D. C., E. D. Mo., Three Judge Court); South Carolina v. Gaillard, 101 U. S. 433, 25 L. Ed. 937; Baltimore & Pacific R. R. Co. v. Grant, 98 U. S. 398, 25 L. Ed. 231; National Exchange Bank v. Peters, 144 U. S. 573, 36 L. Ed. 545; Sherman v. Grinnell, 123 U. S. 679, 31 L. Ed. 278; Gurnee v. County of Patrick, 137 U. S. 145, 34 L. Ed. 601; U. S. v. Chambers, 291 U. S. 217, 78 L. Ed. 763, 54 S. Ct. 434; Moore v. United States, 85 Fed. 765, 29 C. C. A. 269; Federal Land Bank v. United States Bank, 13 Fed. (2d) 36; United States v. Reisinger, 128 U. S. 403, 32 L. Ed. 480, and Great Northern R. Co. v.

United States, 208 U. S. 452, 52 L. Ed. 567, cited by Defendants to support this view.

The Government also takes the position that the Second Act is an amendment of the First Act and cites Sage v. State, 127
65 Ind. 15, 26 N. E. 667; People v. Schoenberg, 161 Mich. 95, 125 N. W. 779; Hair v. State, 16 Nebr. 601, 21 N. W. 464; Jones v. State, 72 Tex. Cr. App. 504, 163 S. W. 81; Britton v. State, 101 Miss. 574, 58 So. 530; Whatley v. State, 46 Fla. 145, 35 S. 80, and other cases, holding generally that an amendment to a statute which is a substantial reenactment thereof does not prevent prosecutions of violations of the Amended Statute. The position is a strong one, but I fail to discover in that line of cases anything akin to the situation we have here of an Act of Congress, not permanent, but temporary, being amended by a Second Act which changes its expiration date, but is silent on the subject of the prosecution of previous violations of the Amended Act.

The First Connally Act having by its own terms expired June 16, 1937, and there now being no provision for the indictment and prosecution of those who violated it while it was in effect, I think Defendants' Demurrer to the Indictment and their Motion to Quash the Indictment must for that reason be sustained and the case dismissed.

T. M. KENNERLY,
Judge Presiding.

[File endorsement omitted.]

66 In United States District Court

Order sustaining demurrers and motions to quash and dismissing case as to defendants Neal Powers and Rene Allred

Entered January 4, 1939

And thereupon the court being opened in due form by order of the Judge, the following proceedings were had to-wit:

[Title omitted.]

January 4, 1939. Demurrer and Motion to Quash, of Defendants Neal Powers and Rene Allred sustained, and the case as to them dismissed. See Opinion this day filed. The Clerk will notify all counsel. T. M. K.

67 In United States District Court

[Title omitted.]

Petition for appeal

Filed January 28, 1939

Comes now the United States of America, plaintiff herein, and states that on the 4th day of January 1939, demurrers and motions to quash interposed by the defendants Neal Powers and Rene Allred,

to each and every count of the indictment herein were by the Court sustained and the plaintiff feeling aggrieved at the ruling of the said District Court sustaining said demurrers and motions to quash, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said Judgment and Order and that a Transcript of Record in this cause duly authenticated may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement, showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
DOUGLAS W. MCGREGOR,
United States Attorney,
Southern District of Texas.

[File endorsement omitted.]

80 In United States District Court

[Title omitted.]

Assignments of error

Filed January 28, 1939

Comes now the United States of America, by Douglas W. McGregor, United States Attorney for the Southern District of Texas, and avers that in the record, proceedings and judgment herein, there is manifest error and against the just rights of the said plaintiff, in this, to-wit:

1. That the court committed material error against the plaintiff in holding that prosecution under the indictment was barred on the ground that violations of the Connally Act of February 22, 1935 (U. S. C. Title 15, Sections 715-715*l*) committed prior to June 16, 1937, could not be punished thereafter, notwithstanding the provisions of the Act of June 14, 1937, extending the duration of the Connally Act until June 30, 1939.

2. That the court erred in applying the rule that after the expiration of a law no punishment may be inflicted for violations committed while it was in force, unless special provision is made therefor, since there was no attempted prosecution of the offenses involved subsequent to the expiration of the statute upon which the indictment was predicated, the Connally Act of 1935 having been extended by Congress during its life to a date which has not yet expired, i. e., June 30, 1939.

3. The court erred in rejecting as inapplicable the rule that where a statute is amended by substantially reenacting it, offenses occurring prior to amendment may be prosecuted thereafter.

4. The court erred in holding that prosecution under the indictment was not saved by virtue of the provisions of R. S. Section 13.

81 5. The court erred in failing to hold that prosecution under the conspiracy could *could* be maintained, even though prosecution under the substantive counts may not be sustainable.

6. The court committed material error against the plaintiff in sustaining demurrers of the defendants Neal Powers and Rene Allred and each of them to the indictment and to each count thereof.

7. The court committed material error against the plaintiff in sustaining the motions of the defendants Neal Powers and Rene Allred to quash the indictment and each and every count thereof.

DOUGLAS W. McGREGOR,
United States Attorney,
Southern District of Texas.

[File endorsement omitted.]

82 In United States District Court

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed January 28, 1939

This cause having come on this day before the Court on the petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for a reversal of the Judgment herein sustaining the demurrers and motions to quash interposed by the defendants Neal Powers and Rene Allred to the indictment in the said cause and to each and every count thereof, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is therefore, by the Court ordered and adjudged that the plaintiff herein, the United States of America, be and it is hereby allowed an appeal from the order and judgment of this Court in sustaining the demurrers and motions of the defendants to quash the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further ordered that the United States of America be and it is hereby, permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Houston, Texas, this 28 day of January 1939.

T. M. KENNERLY, *Judge.*

83 [File endorsement omitted.]

86 [Clerk's certificate to foregoing transcript omitted in printing.]

87 [Citation in usual form showing service on Rene Allred and Neal Powers, filed Feb. 1, 1939, omitted in printing.]

89 In Supreme Court of the United States

[Title omitted.]

Statement of points relied upon and designation of entire record for printing

Filed March 17, 1939

Pursuant to Rule XIII, Paragraph 9, of this Court, appellant states that it intends to rely upon all of the points in its assignment of errors.

Appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

ROBERT H. JACKSON,
Solicitor General.

[File endorsement omitted.]

[Endorsement on cover:] File No. 43,172. St. Texas, D. C. U. S. Term No. 687. The United States of America, Appellant *vs.* Neal Powers and Rene Allred. Filed February 17, 1939. Term No. 687 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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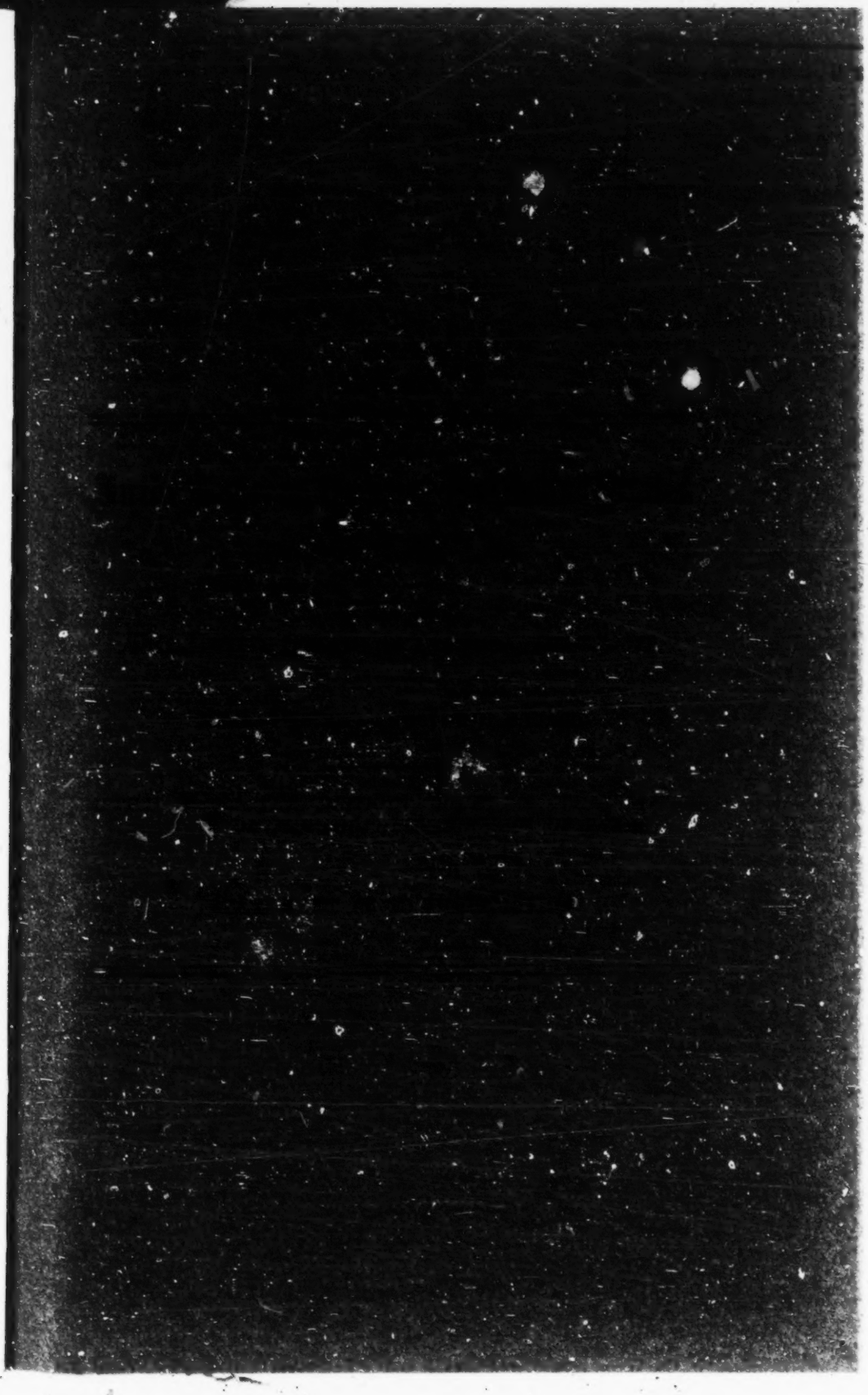

In the District Court of the United States for the Southern District of Texas, Houston Division

Criminal No. 7354

UNITED STATES OF AMERICA, PLAINTIFF

v.

H. E. HINES, NEAL POWERS, AND RENE ALLRED, DEFENDANTS

STATEMENT OF JURISDICTION

Filed January 28, 1939

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the "Criminal Appeals Act," and by Section 345, Title 28, of the United States Code.

B. The statutes of the United States, the construction of which is involved herein, are Sections 3, 6, and 13 of the Connally Act of February 22,

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1935, c. 18, 49 Stat. 30, 31–33 (U. S. C., Title 15, Secs. 715b, 715e, and 715*l*) extending the duration of the Connally Act and Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88).

Section 3 of the Connally Act (U. S. C., Title 15, Section 715b) is as follows:

> The shipment or transportation in interstate commerce from any State of contraband oil produced in such state is hereby prohibited. For the purposes of this section contraband oil shall not be deemed to have been produced in a State, if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such State or under any regulation or order, prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State.

Section 6 of the Connally Act (U. S. C., Title 15, Sec. 715e) is as follows:

> Any person knowingly violating any provision of this Act or any regulation prescribed thereunder shall upon conviction be punished by a fine of not to exceed $2,000 or by imprisonment for not to exceed six months, or by both such fine and imprisonment.

Section 13 of the Connally Act (U. S. C., Title 15, Sec. 715*l*) is as follows:

This Act shall cease to be in effect on June 16, 1937. The Act of June 14, 1937, extending the Connally Act (U. S. C., Title 15, Sec. 715*l*) is as follows:

> To continue in effect until June 30, 1939, the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 13 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State Law and for other purposes," approved February 22, 1935, is amended by striking out "June 16, 1937" and inserting in lieu thereof "June 30, 1939."

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the.

object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years or both.

C. The judgment of the District Court sought to be reviewed was entered on January 4, 1939, and an application for appeal was filed on January 28, 1939, and is presented to the District Court herewith, to wit, on this the 28 day of January 1939.

The Indictment in this case, returned on September 17, 1938, is in ten counts, one of which is based upon Section 37 of the Criminal Code, and nine of which are based upon the Act of February 22, 1935, c. 18, 49 Stat. 30, as amended by the Act of June 14, 1937, c. 35, 50 Stat. 257 (U. S. C., Title 15, Sections 715–7151). The first count alleges a conspiracy by the defendants to violate Section 3 of the Act of February 22, 1935, 49 Stat. 31, as amended, by transporting in interstate commerce, contraband oil produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of the State of Texas and the regulations made pursuant thereto. Each of the remaining counts of the indictment alleges that the defendants did transport in interstate commerce contraband oil produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage by the laws of the State of Texas, and the regulations pursuant thereto.

Demurrers to the indictment and motions to quash were filed by the defendants Neal Powers and Rene Allred and were sustained by the District Court. The Court based its decision solely upon the ground that the first Connally Act of February 22, 1935, was a temporary Act expiring under the terms of Section 13 thereof on June 16, 1937, and that since the Act of June 14, 1937, extending the duration of the first Act to June 30, 1939, contained no saving clause, violations of the 1935 Connally Act could not be punished after June 16, 1937, the expiration date fixed by the first Connally Act.

The question decided by the District Court is a substantial and important one and has not hitherto been settled by a decision of the Supreme Court of the United States. The principal vice of the decision of the District Court is that it treated the Connally Act of 1935 as having expired on June 16, 1937, prior to the indictment herein, notwithstanding that on June 14, 1937, Congress extended the life of the 1935 Act until June 30, 1939.

Here there was no attempted prosecution of the offenses involved subsequent to the expiration of the statute. Since the statute has not expired there is no basis for the application of the rule, relied upon by the court below, that after the expiration of a law no punishment may be inflicted for violations committed while it was in force, unless special provision is made therefor.

The rule is also settled that where a statute is amended by substantially reenacting it, offenses oc-

curring prior to amendment may be prosecuted thereafter. See *Sage* v. *State*, 127 Ind. 15; *People* v. *Schoenberg*, 161 Mich. 88; *Hair* v. *State*, 16 Nebr. 601; see also *Jones* v. *State*, 72 Tex. Cr. App. 504; *Britton* v. *State*, 101 Miss. 574; *Whatley* v. *State*, 46 Fla. 145. While it is true, as the court below stated that decisions enunciating the above rule did not involve temporary Acts, the underlying principle would seem equally applicable to such statutes.

If the 1937 Act extending the Connally Act be construed as having by its terms repeated Section 13 of the 1935 Connally Act, the provisions of R. S. Section 13 (U. S. C., Title 1, Sec. 29) permit a construction which would sustain the present indictment.

That section provides that:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

In any event, it may not necessarily follow that prosecution under the conspiracy count would be precluded even though the substantive counts are not sustainable, since the conspiracy count is based upon a statute permanent in nature (Section 37, Criminal Code; U. S. C., Title 18, Sec. 88).

The following decisions are believed to sustain the jurisdiction of the Supreme Court: *United States* v. *Heinze,* 218 U. S. 532; *United States* v. *Hastings,* 296 U. S. 188; *United States* v. *Bitty,* 208 U. S. 393; *United States* v. *Keitel,* 211 U. S. 370. Appended hereto is a copy of the opinion of the Court filed on January 4, 1939.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

DOUGLAS W. MCGREGOR,
United States Attorney.

[Indorsed:] Filed January 28, 1939.

L. C. MASTERSON, *Clerk.*
By L. M. BERLY, *Deputy.*

In the District Court of the United States for the Southern District of Texas, Houston Division

Cr. No. 7354

UNITED STATES OF AMERICA, PLAINTIFF

v.

H. E. HINES, NEAL POWERS, RENE ALLRED, DEFENDANTS

JANUARY 4, 1939

Wm. W. Barron, Special Assistant to the Attorney General, Washington, D. C.; for United States of America.

E. A. Simpson, of Amarillo, Texas; Elbert Hooper, of Austin, Texas; Robert E. Cofer, of Austin, Texas; John D. Cofer, of Austin, Texas; Myron G. Blalock, of Marshall, Texas; Jack Blalock, of Houston, Texas; and Clarence Lohman, of Houston, Texas; for Defendants Neal Powers and Rene Allred.

KENNERLY, *District Judge:* This is a case arising under an Act of Congress approved and effective February 22, 1935, and expiring June 16, 1937, regulating the Interstate Transportation of Petroleum Products, and generally known as the Connally Act (49 Stat. 30, Sections 715 to 715 (1) of Title 15, U. S. C. A.), and an Act of Congress approved

and effective June 14, 1937, continuing the Connally Act in force until June 30, 1939 (50 Stat. 257, Sections 715 to 715 (1) of Title 15, U. S. C. A.). For convenience, the Act of February 22, 1935, is referred to as the First Connally Act or as the First Act, and the Act of June 16, 1937, as the Second Connally Act or the Second Act.

This is the third criminal prosecution in this Court under such Acts. In the first case (No. 6894, *United States* v. *Gibson et al.*), the Indictment was filed against a large number of defendants, and the case disposed of as to all except three or four of them while the First Act was still in effect. As to the remaining three or four defendants, it was dismissed by the Government after the Second Act became effective. In the second case (No. 7016, *United States* v. *Gibson et al.*), the Indictment was filed against several defendants after the Second Act became effective and all defendants without questioning the Indictment entered pleas of guilty except one, and the case was dismissed by the Government against that one.

In this case, Defendants Allred and Powers are charged by Indictment filed September 17, 1938, with Conspiracy (Section 88, Title 18, U. S. C. A.) to violate such Acts and with violations of such Acts, and have demurred to and moved to quash and dismiss the Indictment, and this is a hearing on such Demurrer and Motion.

1. Defendants say that the particular thing or things claimed to have been done by them are not

so set forth in the Indictment as to inform them of the nature and character of the charge against them, in that while they are charged under such Acts with conspiring to transport and transporting in interstate commerce contraband oil within the meaning of such Acts, i. e., petroleum produced, transported, or withdrawn from storage in violation of the Laws of Texas and the regulations and orders of the Railroad Commission of Texas, the Indictment does not set forth the particular Law, Regulation, or Order violated and does not show such Law, Regulation, or Order to have been valid. And that the Indictment does not set forth the amount of oil so produced, where and by whom produced, the circumstances of production, etc.

The Conspiracy Count sets forth the names of the alleged conspirators (so far as known to the Grand Jury), the time during which the conspiracy existed, the plan to transport contraband oil in interstate commerce, i. e., from the Conroe field in Montgomery County, in the State of Texas, by a route named to Marcus Hook, in the State of Pennsylvania, the manner in which such oil was or was to be gathered preparatory to transportation, and the property or lease on which such oil, or some of it, was to be and was produced. It is set forth that the conspiracy was formed:

> to commit drivers, various, and sundry offenses against the United States of America, to wit:
>
> (a) To unlawfully and knowingly violate the laws of the United States, in particular

an Act of Congress approved February 22, 1935, being Public, No. 14, 74th Congress, and entitled:

"An Act to regulate Interstate and Foreign Commerce in Petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of the State laws and for other purposes" (as amended) by producing, transporting, and withdrawing from storage petroleum, which, or a constituent part of which, was produced, transported, and withdrawn from storage in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of the State of Texas, and under the regulations and orders prescribed thereunder by the Railroad Commission of the State of Texas, and its officers, by producing oil in excess of the allowed oil, as provided by the orders of the Railroad Commission, etc.

There are set forth 45 separate and distinct Overt Acts.

The Substantive counts in the Indictment each sets forth the date of the alleged offense, the transportation of contraband oil in Interstate Commerce, i. e., from Conroe Oil Field in Montgomery County, in Texas, to Marcus Hook, in the State of Pennsylvania, the quantity transported, and that such oil, or a constituent part thereof:

was produced, transported, and withdrawn from storage in excess of the amounts per-

> mitted to be produced, transported, and withdrawn from storage, under the laws of the State of Texas, and the regulations and orders prescribed by the Railroad Commission of the State of Texas, a duly authorized agency of such State.

On demurrer and motion to quash the Indictment and on these particular complaints urged against it, I think the Indictment must be sustained. Whether Defendants may require the Government, by Bill of Particulars, to be more specific with respect thereto is not before me.

It is clear also that the Overt Acts in the Conspiracy Count are sufficient. It need not be shown in the Indictment, as Defendants contend, in what manner such Overt Acts were connected with the alleged conspiracy, nor is it necessary that such acts be unlawful within themselves.

It is likewise clear that the Indictment, both in the Conspiracy Count and in the Substantive Counts, sufficiently sets forth that Defendants knowingly did the different acts and things they are charged with doing.

2. Defendants also contend that the Acts apply to Oil, etc., produced prior to their enactment, and not to that thereafter produced.

This question was before the Court and disposed of, and I think correctly disposed of, in *United States* v. *Gibson et al.*, decided May 21, 1937. It was there said:

> It is also said that the Connally Act is only applicable to oil produced, etc., before

the effective date of such Act (February 22, 1935), and in violation of Laws and Regulations of Texas in existence and in force prior to such effective date (February 22, 1935).

The portion of Section 715b under which the Indictment is drawn is as follows:

"The shipment or transportation in interstate commerce from any State of contraband oil produced in such State is hereby prohibited."

Contraband Oil is defined by Section 715a as follows:

"The term 'contraband oil' means petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State, or any of the products of such petroleum."

And is further defined in Section 715b:

"For the purposes of this section contraband oil shall not be deemed to have been produced in a State if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such State or under any regulation or order prescribed thereunder by any board, commission, offi-

cer, or other duly authorized agency of such State."

It is plain that what is prohibited is transportation in Interstate Commerce of contraband oil produced both before and after the effective date of the Act, and under Laws and Regulations in existence and in force both before and after such effective date.

3. Defendants bring forward many contentions with respect to the constitutional validity of the Acts. In *President of the United States* v. *Artex Refineries Sales Corporation*, 11 Fed. Supp. 189, this Court said:

> Defendants, by their motion to dismiss, attack the constitutional validity of the Connally Act. I think that question must be regarded as settled in this (Fifth) circuit against defendants' contention by the ruling of the Circuit Court of Appeals, in passing upon the validity of Section 9 of the National Industrial Recovery Act (Section 709, Title 15, U. S. C. A.), in the Ryan and Panama Cases (*Ryan* v. *Amazon Petroleum Corporation*, 71 F. (2d) 1, 2; *Ryan* v. *Panama Refining Co.*; 71 F. (2d) 8), which ruling this court deems it proper to follow.

Several subsequent decisions support this view. I adhere to the ruling there made and uphold the constitutional validity of both Acts as against the contentions of Defendants now made.

4. Count One of the Indictment charges a conspiracy to violate such Acts beginning September 4, 1935, and existing until March 15, 1937, and the

Substantive Counts charge violations of such Acts on and between November 4, 1935, and March 20, 1936. All are alleged to have been between September 4, 1935, and March 15, 1937, at a time when the production, transportation, etc., of petroleum oil was controlled and regulated in Texas by Title 102 of Vernon's Civil Statutes of Texas (Texas Revised Civil Statutes of 1925 and Amendments), and particularly Articles 6049c and 6049d of Vernon's Statute regarding Proration (Act of 44th Texas Legislature of 1935, Ch. 76, p. 180), Section 20 of which provided that the provisions of such Act should end and terminate September 1, 1937.

The 45th Texas Legislature in 1937 passed an Act providing that the provisions of the Act of 1935 should end and terminate September 1, 1939.

Defendants say that this Indictment and this prosecution under the Connally Acts must fall because neither in the Texas Act of 1935 nor in the Texas Act of 1937 is there to be found a saving clause as to violations of or penalties arising under the Texas Act of 1935, and that if there be a saving clause in the Texas Act of 1937, it is retroactive, etc. The questions are interesting ones, and perhaps serious ones, but in view of the next question which Defendants raise and the disposition thereof, it does not seem necessary to decide them.

While the Indictment is drawn under both the First Connally Act (in force from February 22, 1935, to June 16, 1937) and the Second Connally

Act (in force from June 14, 1937, to June 30, 1939), it clearly appears that all violations charged against Defendants are of the First Act.

Defendants contend that since neither the First Act nor the Second Act contains a saving clause, and the Second Act is silent as to the Indictment and prosecution of persons charged with violating the First Act, Defendants cannot, since the expiration of the First Act, be lawfully prosecuted for violation thereof, and that the Indictment should be quashed and the case dismissed.

The general and well-settled rule is stated in *The Irresistible,* 7 Wheat. (U. S.) 551; 5 L. E. 520 [Italics mine]:

> This is an appeal from a sentence of the circuit court of the United States for the district of Maryland, dismissing an information filed in that court against the brig La Irresistible, as forfeited, under the acts of congress made for the preservation of the neutrality of the United States. The offense charged in the information was committed under the act of 1817, and the only question is whether the information can be sustained after the time when that act would have expired by its own limitation?
>
> The act was to continue in force two years after the 3d of March 1817. On the 20th of April 1818, congress passed an act making further provision on the same subject, which repealed all former acts on that subject, and among these the act of 1817, and annexed to the repealing clause the following proviso,

"Provided, nevertheless, that persons having offended against any of the acts aforesaid may be prosecuted, convicted, and punished, as if the same were not repealed, and no forfeiture heretofore incurred by a violation of any of the acts aforesaid shall be affected by such repeal." The obvious construction of this clause is, that the power to prosecute, convict, and punish offenders against either of the repealed acts remains as if the repealing act had never been passed. It does not create a power to punish, but preserves that which before existed. *Now, it is well settled, that an offence against a temporary act cannot be punished, after the expiration of the act, unless a particular provision be made by law for the purpose.*

See also *U. S.* v. *Tynan,* 11 Wallace 88, 20 L. E. 153; *Yeaten* v. *U. S.,* 5 Cranch 281, 3 L. Ed. 101.

The question for determination is whether particular provision has been made by law for the indictment and prosecution of persons who may have violated the First Act, which expired as stated June 16, 1937.

The Second Act is as follows:

AN ACT To continue in effect until June 30, 1939, the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935, is amended by striking out "June 16, 1937" and inserting in lieu thereof "June 30, 1939."

Approved, June 14, 1937.

As Defendants insist, it is silent on the question of the prosecution of those who may have violated the First Act. It simply changes the date of expiration of the First Act from June 16, 1937, to June 30, 1939. Those who violated the First Act were only guilty of a misdemeanor. It was passed in aid of the laws of the States regulating a perfectly legitimate business—the production of petroleum oil. It was by its own terms temporary, indicating that changing conditions in the production of petroleum oil, or changes in the laws of the States regulating such production, or other reason would make it in the public interest for it to terminate. There were no provisions therein for the prosecution after its expiration of those who had violated it before such expiration.

The last violation of the First Act, as charged in the substantive counts of the Indictment, is alleged to have occurred March 20, 1936, more than

a year before the expiration date of the First Act, more than a year before the effective date of the Second Act, and nearly two and one-half years before the filing of the Indictment. The Indictment was filed nearly one and one-half years after the alleged termination of the Conspiracy charged in Count One.

Viewing the matter from all standpoints, I think it must be held that there is and can be no certainty that Congress, by passing the Second Act, intended to preserve the right of the Government to prosecute violations of the First Act.

But, citing *Schench* v. *United States,* 249 U. S. 47, 63 L. Ed. 473, and other cases, the Government insists that the mere passage of the Second Act is sufficient evidence of the intent of Congress that those who had violated the First Act should be prosecuted. I find no case that it seems to me goes so far. The most that can be said with respect to the Second Act is that it provides for the prosecution of violations occurring after its effective date (June 14, 1937) and prior to the date of its expiration (June 30, 1939). *Kring* v. *State of Missouri,* 17 Otto, 221, 107 U. S. 231, 27 L. Ed 509, 2 S. Ct. 451. *Murray* v. *Gibson,* 15 How. (U. S.), 421, 14 L. Ed. 755. *Brewster* v. *Gage,* 280 U. S. 338, 74 L. Ed. 457, 463. *United States* v. *St. Louis, S. F. & T. R. Co.,* 270 U. S. 1, 70 L. Ed. 435. Russell 1. *United States,* 278 U. S. 181, 73 L. Ed. 255. *Chew Heong* v. *United States,* 112 U. S. 536, 28 L. Ed. 770.

The Government also says that Section 29, Title 1, U. S. C. A., provides the necessary provision respecting prosecutions of violations of the First Act. This reads as follows [italics mine]:

> The *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

An examination of the common law rule, and of the history of this section and its wording, is convincing that it has no application to temporary Acts such as was the First Act, but only to *repeals*. There must be a plain provision with respect to Temporary Acts. Nothing appears in *Great Northern Railway Co.* v. *United States*, 208 U. S. 459, 52 L. Ed. 573; *Hertz* v. *Woodman*, 218 U. S. 212, 54 L. Ed. 1005; and other cases cited by the Government, contrary to this view, and there is much to be found in *The Irresistible*, 7 Wheat. (U. S.) 551, 5 L. Ed. 520; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. Ed. 255; *United States* v. *Curtiss-Wright Export Corp*, 14 Fed. Supp. 230; *Missouri-Pac. R. Co.* v. *United States*, 16 Fed. Supp. 752 (D. C.; E. D. Mo.; Three Judge Court); *South Carolina* v. *Gaillard*, 101 U. S. 433, 25 L. Ed. 937; *Baltimore & Pacific R. R. Co.* v.

Grant, 98 U. S. 398, 25 L. Ed. 231; *National Exchange Bank* v. *Peters*, 144 U. S. 573, 36 L. Ed. 545; *Sherman* v. *Grinnell*, 120 U. S. 679, 31 L. Ed. 278; *Gurnee* v. *County of Patrick*, 137 U. S. 145, 34 L. Ed. 601; *U. S.* v. *Chambers*, 291 U. S. 217, 78 L. Ed. 763, 54 S. Ct. 434; *Moore* v. *United States*, 85 Fed. 765, 29 C. C. A. 269; *Federal Land Bank* v. *United States Bank*, 13 Fed (2d) 36; *United States* v. *Reisinger*, 128 U. S. 403, 32 L. Ed. 480; and *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 52 L. Ed. 567, cited by Defendants to support this view.

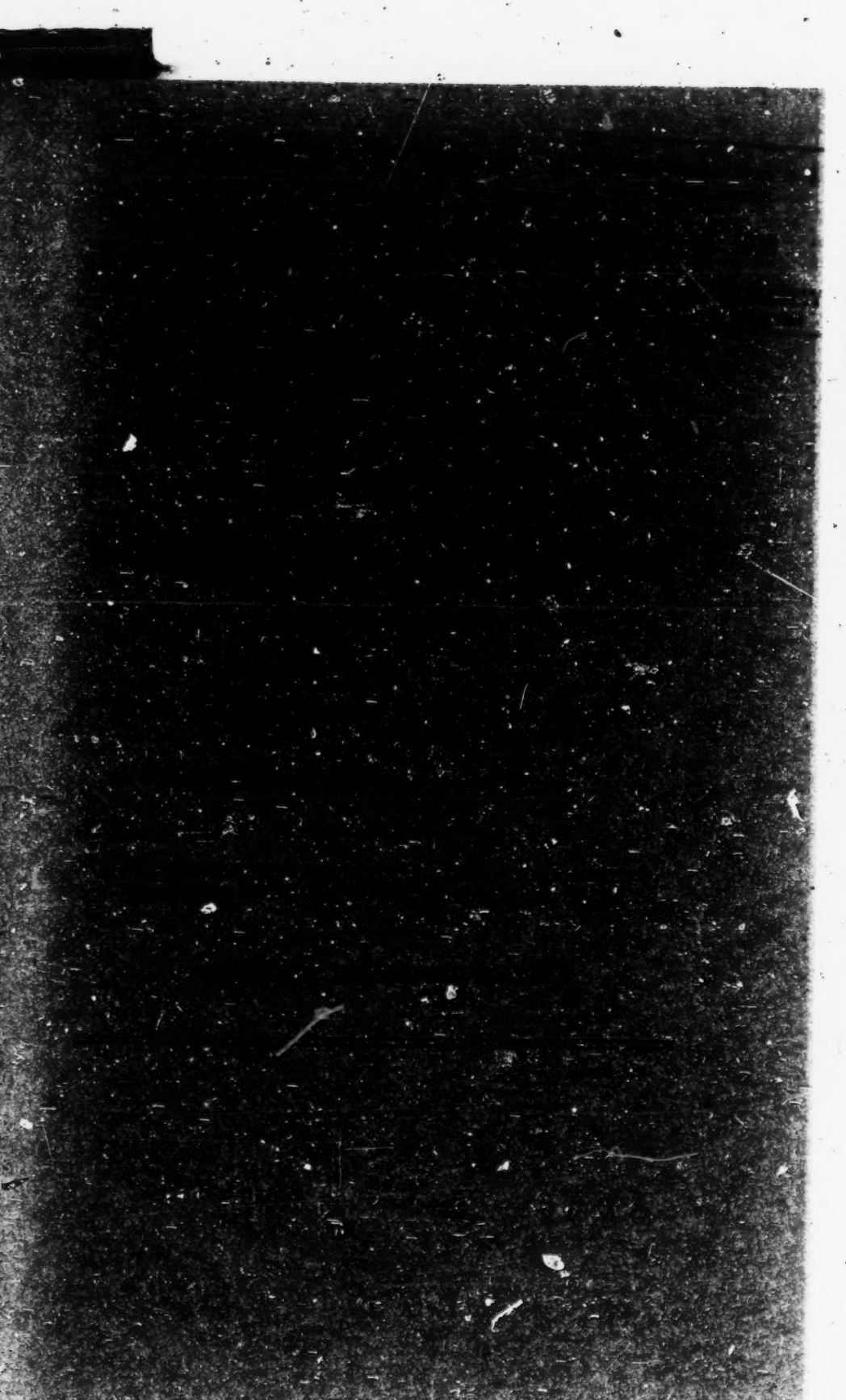
The Government also takes the position that the Second Act is an amendment of the First Act and cites *Sage* v. *State*, 127 Ind. 15, 26 N. E. 667; *People* v. *Schoenberg*, 161 Mich. 88, 125 N. W. 779; *Hair* v. *State*, 16 Nebr. 601, 21 N. W. 464; *Jones* v. *State*, 72 Tex. Cr. App. 504, 163 S. W. 81; *Britton* v. *State*, 101 Miss. 574, 58 So. 530; *Whatley* v. *State*, 46 Fla. 145, 35 S. 80; and other cases, holding generally that an amendment to a statute which is a substantial reenactment thereof does not prevent prosecutions of violations of the Amended Statute. The position is a strong one, but I fail to discover in that line of cases anything akin to the situation we have here of an Act of Congress, not permanent, but temporary, being amended by a Second Act which changes its expiration date, but is silent on the subject of the prosecution of previous violations of the Amended Act.

The First Connally Act having by its own terms expired June 16, 1937, and there now being no provision for the indictment and prosecution of those who violated it while it was in effect, I think Defendants' Demurrer to the Indictment and their Motion to Quash the Indictment must for that reason be sustained and the case dismissed.

T. M. KENNERLY,
Judge Presiding.

[Endorsements:] Cr. No. 7354. In the District Court of the United States For the Southern District of Texas, Houston Division, *United States of America, Plaintiff,* versus *M. E. Hines, Neal Powers, Rene Allred, Defendants.* MEMORANDUM OF COURT, SUSTAINING DEFENDANTS' DEMURRER TO THE INDICTMENT AND MOTION TO QUASH THE INDICTMENT. Filed 4 day of Jan. 1939. L. C. Masterson, Clerk; By L. M. Berly, Deputy.

U. S. GOVERNMENT PRINTING OFFICE: 1939



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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 687

THE UNITED STATES OF AMERICA, APPELLANT

v.

NEAL POWERS AND RENE ALLRED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 41–48) is not yet reported.

JURISDICTION

The order of the District Court was entered on January 4, 1939 (R. 48). The appeal was prayed and allowed on January 28, 1939 (R. 48, 50). The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and by Section 238 of the Judicial Code, as amended.

Probable jurisdiction was noted by this Court on March 13, 1939.

QUESTION PRESENTED

May a prosecution for violation of and conspiracy to violate the Connally (Hot Oil) Act of February 22, 1935, committed prior to June 16, 1937, the date originally fixed for the expiration of that Act, be maintained after that date, the Act having beeen extended to June 30, 1939, by the Act of June 14, 1937?

STATUTES INVOLVED

The relevant portions of the Connally (Hot Oil) Act of February 22, 1935 (c. 18, 49 Stat. 30, U. S. C., Supp. IV, Title 15, Secs. 715 *et seq.*), and the Act of June 14, 1937 (c. 335, 50 Stat. 257), extending the Connally Act of 1935, are set out in Appendix A, *infra*, pp. 27–35.

STATEMENT

On September 17, 1938, H. E. Hines, Neal Powers, and Rene Allred were indicted in the District Court of the United States for the Southern District of Texas (R. 2). The indictment was in ten counts. The first count (R. 3–10) charges a conspiracy by the defendants to violate the Act of February 22, 1935, as amended, by transporting in interstate commerce, from the Conroe Oil Field in Montgomery County, Texas, to Marcus Hook, Pennsylvania, oil produced, transported and withdrawn from storage in excess of the amounts per-

mitted to be produced, transported and withdrawn from storage under the laws of the State of Texas and under the regulations and orders made pursuant thereto. The conspiracy is alleged to have begun on or about September 4, 1935, and continued until on or about March 15, 1937 (R. 4). The count alleges 45 overt acts (R. 4–10).

Each of the remaining nine counts (R. 10–14) charges a substantive violation, and alleges that defendants transported in interstate commerce oil produced, transported and withdrawn from storage in excess of the amounts permitted to be produced, transported and withdrawn from storage by the laws of the State of Texas and the regulations made pursuant thereto. These transportations are alleged to have been made between the same places alleged in the conspiracy count, and on various dates from November 4, 1935, to March 20, 1936.

On October 14, 1938, Neal Powers and Rene Allred, appellees herein (hereafter referred to as defendants) each filed demurrers to the indictment and motions to quash and dismiss the indictment on numerous grounds (R. 15–27, 28–41). The District Court rejected some of these grounds, holding (1) that the indictment sufficiently stated the nature and character of the charge made (R. 42–43) and that the acts had been done knowingly (R. 43); (2) that the Act is applicable to oil produced subsequent to the date of its enactment, as well as to that produced prior thereto (R. 43–44);

and (3) that the Act is constitutional (R. 44). One of the grounds urged—that certain Texas statutes had expired—was mentioned but not decided (R. 44–45). Finally, however, the District Court sustained the demurrers on the sole ground that the indictment, charging violations of the Act before its original expiration date, but having been returned after that date, could not be maintainted (R. 44–48). Accordingly, on January 4, 1939, the District Court dismissed the indictment (R. 48).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that prosecution under the indictment was barred on the ground that violations of the Connally Act of February 22, 1935, committed prior to June 16, 1937, could not be punished thereafter, notwithstanding the provisions of the Act of June 14, 1937, extending the duration of the Connally Act until June 30, 1939.

2. In applying the rule that after the expiration of a law no punishment may be inflicted for violations committed while it was in force, unless special provision is made therefor, since there was no attempted prosecution of the offenses involved subsequent to the expiration of the statute upon which the indictment was predicated, the Connally Act of 1935 having been extened by Congress during its life to a date which has not yet expired, i. e., June 30, 1939.

3. In rejecting as inapplicable the rule that where a statute is amended by substantially re-enacting it, offenses occurring prior to amendment may be prosecuted thereafter.

4. In holding that the prosecution under the indictment was not saved by virtue of the provisions of R. S., Section 13.

5. In failing to hold that prosecution under the conspiracy count could be maintained, even though prosecution under the substantive counts may not be sustainable.

6. In sustaining demurrers of the defendants Neal Powers and Rene Allred, and each of them to the indictment and to each count thereof.

7. In sustaining the motions of the defendants Neal Powers and Rene Allred to quash the indictment and each and every count thereof.

SUMMARY OR ARGUMENT

I

The District Court in this case has held that violations of the Connally Act occurring before the date originally set for its expiration cannot now be punished, since the Act was temporary only and contained no clause continuing liability for such violations. We believe the conclusion to be erroneous. Prior to the original date of expiration the Act was extended to June 30, 1939, and has in fact never ceased to be in effect. There is

only one Act, and at least until June 30, 1939, it affords complete statutory support for the present prosecutions. Such little authority as there is is completely in accord. *The Irresistible,* 7 Wheat. 551, relied upon by the District Court, is plainly inapplicable since it refers only to a situation in which a temporary Act has expired.

II

A. But the decision of the District Court is erroneous even on its assumption that the violations alleged were of a "First" Act which expired on June 16, 1937. The expiration of a temporary statute does not prevent a prosecution for offenses committed while it was in effect. A contrary rule of the common law has been stated in early decisions of this Court, but it is simply an arbitrary assumption of legislative intent which no longer accords with the actual intent of Congress, if, indeed, it ever did. Since those early decisions the parallel common-law rule with respect to the termination of prosecutions after the repeal of a criminal Act has been specifically changed by Congress, and by practically every other legislative body originally subject to it. Revised Statutes, Section 13. Moreover, the common-law rule as to temporary statutes inevitably makes them completely ineffective for a substantial period of time before the date actually set for their expiration. The decision in *United States* v. *Chambers,* 291

U. S. 217, is not to the contrary. The question there was one of the power of Congress rather than of its intent.

B. Finally, even if there be two Acts, and the common-law rule applies, nevertheless the "Second" Act was competent authority which authorized the continuance of the present prosecutions. The principle that an amendment of a criminal statute does not absolve the guilt of the one who has violated the statute prior to the amendment is directly applicable.

ARGUMENT

I

THE ACT UNDER WHICH THE PRESENT INDICTMENT WAS RETURNED HAS NEVER EXPIRED

The District Court, in the present case, sustained demurrers to an indictment which charged the defendants with several violations of the Connally (Hot Oil) Act of 1935, as amended, *infra*, pp. 27–35. The decision was based solely upon the ground that the violations charged in the indictment were no longer punishable, since they occurred prior to June 16, 1937, the date upon which the Act was originally to cease to be in effect. Section 13, *infra*, p. 34. The court relied upon the fact that the Act was a temporary one, and that neither the original Act nor the amendment by which the expiration date was changed from June 16, 1937, to June 30.

1939 (Act of June 14, 1937, *infra*, pp. 34–35), contained a clause continuing liability for acts done prior to the original expiration date. The court dismissed as irrelevant the fact that, due to the amendment, ***the Act has never ceased to be in effect.***

We submit that the decision is plainly wrong. The question, of course, is one of the *intention* of Congress, for there can be no doubt that Congress has *power* to maintain in force, for the purpose of the continuance of prosecutions, its own enactments after their expiration or repeal. *United States* v. *Chambers*, 291 U. S. 217, 224. Even if the prior Congress which originally passed the Act had intended that all liability for violations of it should cease on June 16, 1937 (an intention which we do not believe existed, see pp. 16–24, *infra*), nevertheless, the subsequent Congress, which amended the Act, could have ignored that intent, and have continued it in force for another limited period beyond that date, or in perpetuity. Every legislative body may modify or repeal acts passed by itself or its predecessors. Cf. *Newton* v. *Commissioners*, 100 U. S. 548, 559; *Mongeon* v. *People*, 55 N. Y. 613.

In the present case we believe that there can be no doubt as to the *intention* of Congress. By the amendment to the Act, passed in 1937 before the original expiration date, Congress has specifically enacted that "This Act shall cease to be in effect on June 30, 1939" (Section 13, as amended). That

date is still in the future. Congress, in other words, as clearly as it possibly could do so, has declared that the Act shall continue in effect.[1]

Under the amendment the situation is precisely the same as that which would have existed had that been the date originally stated. The lower court, throughout its opinion, assumed that the case involved two independent statutes, one expiring on June 16, 1937, and a new Act coming into effect immediately thereafter, which in turn would expire on June 30, 1939. But there is no "First Act" or "Second Act," as they were referred to throughout the District Court's opinion (see R. 46-48). There is simply one statute, which Congress first stated would cease to be in effect on June 16, 1937, but prior to that date extended for two more years, to June 30, 1939. The defendants were indicted for violation of that Act. At least until June 30, 1939, there is complete statutory support for that prosecution.

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[1] The intention of Congress in changing the date upon which the Act was to cease to be in effect is clear from the amendment itself. If further proof were necessary, however, the title of the amendatory statute, which may be referred to as indicative of Congressional intent (*White* v. *United States*, 191 U. S. 545; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457), is conclusive. It reads:

"An Act To continue in effect until June 30, 1939, the Act entitled 'An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,' approved February 22, 1935."

We have been unable to find any authority whatever for the conclusion reached by the District Court—that even though a temporary Act be continued prior to its original expiration date, offenses committed before that time cannot thereafter be prosecuted. The authorities to the contrary are not numerous, but they completely reveal the fallacy of defendants' position. In *Sims* v. *United States,* 121 Fed. 515 (C. C. A. 9th), an indictment was returned on June 7, 1902, for violating, on February 15, 1902, a 10-year Chinese Exclusion Act which was to have expired on May 4 or 5, 1902. On April 29, 1902,[2] Congress provided that the law should be "re-enacted, extended, and continued * * * until otherwise provided by law". The contention here sustained was urged against the indictment, and the same authorities as are cited in the District Court's opinion here were relied upon. The court stated (121 Fed. at 517–518):

> The act of May 5, 1902,[2] expressly continues in force all the laws prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent. It is a particular provision continuing such laws in force for all purposes. It went into effect while those laws were still in existence. There was no break, no hiatus, in the existing legislation providing

[2] The opinion gives the date as May 5, 1902 (121 Fed. at p. 517), which is apparently an error. See Act of April 29, 1902, c. 641, 32 Stat. 176.

> for the exclusion of Chinese and for the punishment of infractions of the act. The act of May 5, 1902, did not create a new law or repeal the old. It simply extended the life of the existing statutes.

We have been unable to discover any other case in the United States in which the contention has been raised.[3] Perhaps it is not unreasonable to assume that it is wholly devoid of merit. At least in England, the question has been settled for over 300 years, and has not even been raised in recent times. In *Dingley v. Moor,* Cro. Eliz. 750, 78 Eng. Rep. 982 (1600), a temporary statute had been made permanent by a later act. An indictment was laid under the temporary statute, and sustained. The court stated:

> * * * where a statute is made perpetual in part, or in whole, without any new addi-

[3] In *The General Pinkney*, 5 Cr. 281, the ship libelled had violated an Act passed on February 28, 1806, and limited to one year. On February 24, 1807, the Act was continued until April 26, 1808. It had expired completely before the decision of this Court. The opinion first demonstrates that an appeal in admiralty results in a hearing *de novo* in the appellate court, and then finds that the forfeiture can no longer be enforced. If the rule here applied by the District Court is sound, the Court could have much more easily disposed of the case on the ground that the original condemnation in the District Court was erroneous, for at that time (July 23, 1807) the original temporary act under which the offenses were committed had expired. Of course, the decisions in both the District Court and the Circuit Court in that case are directly contrary to the result here reached. See also *Commonwealth* v. *Cain*, 14 Bush (Ky.) 525, 534.

> tion or alteration, the offence may well be supposed against the form of the first statute; for that Act is made to continue.

The question arose again in 1736, in *Rex* v. *Morgan,* 2 Strange 1066, 93 Eng. Rep. 1036, in which a temporary law, for five years, was continued with some alteration. An indictment was laid under the first law. Lord Chief Justice Hardwicke stated:

> When an act is continued, every body is estopped to say it is not in force. And as it is not altered in this respect, it is but a common continuance *quoad hoc.*

Again, in 1790, in *Shipman* v. *Henbest,* 4 T. R. 109, 100 Eng. Rep. 921, an action was brought by an informer under 1 J. 1, c. 22, a temporary statute which imposed certain penalties, and which had been continued temporarily. Lord Kenyon, Chief Justice, said (p. 114):

> We are all most clearly of opinion that this must be considered as an action on the 1 J. 1, c. 22; and that the subsequent laws, which have continued it from time to time, all give effect to it as an act made in the reign of the 1 J. 1.

See also *Rex* v. *Swiney,* Alcock & N. 131, 132 (1832); *Ex parte Drydon,* 5 T. R. 417, 101 Eng. Rep. 235.

The text writers uniformly have taken the same view. Chancellor Kent, citing the English cases discussed above, states his agreement with the rule

laid down in those cases. Kent's *Commentaries* (14th Ed.), Vol. 1, p. 465. The same rule is stated in Endlich, *Interpretation of Statutes* (1888), p. 693:

> * * * if a temporary Act be continued by a subsequent one, or an expired Act be revived by a later one, all infringements of the provisions contained in it are breaches of it rather than of the renewing or reviving statute.

See also Dwarris, *Statutes* (2d ed. 1848) p. 528. Compare Coke, *Institutes*, Vol. 4, p. *171.

The decisions, and the statements in the texts, are, we believe, conclusive evidence against the conclusion of the District Court that the amendment of the Act in 1937 was intended to substitute a new Act, and not to continue the original act in effect. The question, of course, is not one of law—Congress can do as it wishes, and the problem is what it has intended to do. Nevertheless, the authorities cited above illustrate that in the absence of evidence to the contrary, the extension of a temporary act by a later one is not generally to be considered as the creation of a new statute, but rather the renewal and continuance of the old for an additional period of time.

Certainly the decisions relied upon by the District Court do not establish a contrary canon of interpretation. In *The Irresistible*, 7 Wheat. 551, an information had been filed against a ship under a temporary statute, which was, however, repealed,

with a proviso. Chief Justice Marshall held that the proviso simply left the statute as if the repealing Act had never been passed. Consequently, the common-law rule as to temporary Acts was applicable. He stated it as follows (p. 551):

> Now, it is well settled, that an offense against a temporary act cannot be punished, *after the expiration of the act,* unless a particular provision be made by law for the purpose. [Italics supplied.]

The rule had been earlier stated in *The General Pinkney* (*Yeaton* v. *United States*), 5 Cranch 281, 282. See also the statement of the common-law rule in Maxwell, *Interpretation of Statutes* (6th ed. 1920), p. 728.

The decision is in terms inapplicable to a case, such as that here presented, where the temporary act *has not expired.* We shall urge below, pp. 16–24, that the common-law rule with respect to the effect of the expiration of the temporary statutes can no longer be accepted as a correct presumption as to the intention of Congress. But apart from that, the rule, as the early cases cited above reveal, had application only to a temporary act which had not been extended.

We submit, therefore, that the Act under which the present indictment was laid should be considered for all purposes exactly as if Section 13 had originally stated that it should cease to be in effect on June 30, 1939, and that the indictment should be held valid and proper. A statute should not be given a construction which will render it

ineffective or inefficient if another and more reasonable construction is equally possible. *Graham & Foster* v. *Goodcell,* 282 U. S. 409; *Bird* v. *United States,* 187 U. S. 118. Under the wholly artificial dichotomy of the court below, an Act which was amended only by changing a date, and was, we submit, obviously meant to function in all respects as would an ordinary statute during the period until it was finally to cease to be in effect, becomes two unrelated enactments, dealing with the same subject, but otherwise so independent that the amendment cannot even continue to give life to the Act which it amends. Criminal statutes, of course, are to be construed strictly, but, like other statutes, they are to be construed to carry out the obvious intent of the legislature. *Fasulo* v. *United States,* 272 U. S. 620; *Lamar* v. *United States,* 241 U. S. 103. This, we submit, the construction adopted by the court below wholly fails to do.

II

EVEN IF THE ASSUMPTION OF THE DISTRICT COURT BE ACCEPTED—THAT THERE WERE TWO ACTS, THE FIRST EXPIRING ON JUNE 16, 1937—NEVERTHELESS, ITS DECISION IS ERRONEOUS

As we have stated above, we believe that in no real sense can there be said to be two statutes—a "First" and a "Second" Act. Rather, there was one continuing Act, which has not yet expired, and which gives complete statutory support to the present prosecution. Nevertheless, even if the assump-

tion of the District Court be accepted, we submit that, for several reasons, offenses against the so-called First Act may still be prosecuted.

1. THE EXPIRATION OF A TEMPORARY STATUTE DOES NOT PREVENT A PROSECUTION FOR OFFENSES COMMITTED WHILE THE ACT WAS IN EFFECT

Chief Justice Marshall stated the common-law rule in *The Irresistible*, 7 Wheat. 551, that an offense against a temporary Act cannot be punished after the expiration of the Act, unless a particular provision be made by law for that purpose. The same statement had been made in *The General Pinkney*, 5 Cranch 281, which was followed in *The Ship Helen*, 6 Cranch 203. From 1822 to the present time the rule has apparently never been made the basis of decision in this Court.[4] We submit that it should no longer be deemed applicable to the temporary criminal statutes enacted by Congress.

We do not take issue, of course, with the principle that once legislative authority for a prosecution has ceased, the prosecution may no longer be continued. *United States* v. *Chambers*, 291 U. S. 217. This Court stated in the *Chambers* case that the principle is continuing and vital that "if the prosecution

[4] Occasional reference has since been made to the doctrine of those cases. See *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 465 (dissent); *The Reform*, 3 Wall. 617, 629; *Gwin* v. *United States*, 184 U. S. 669, 675; *United States* v. *Chambers*, 291 U. S. 217, 223; *Moore* v. *United States*, 85 Fed. 465, 468 (C. C. A. 8th); *Green* v. *United States*, 67 F. (2d) 846 (C. C. A. 9th). See also *Commonwealth* v. *Cain*, 14 Bush (Ky.) 525, 536.

continues the law must continue to vivify it" (291 U. S. at 226).

But acceptance of that principle does not require acceptance of the common-law rule, as stated by Chief Justice Marshall, that "particular provision" must be made if punishment is to be possible after the expiration date set in the statute. That rule finds its sole basis in the assumption that Congress, by stating that a law shall cease to be in effect on some future date *intends* not only that the prohibited acts shall no longer be forbidden, but also that there should be a general absolution of all those who had done the prohibited acts before the expiration date. And it is solely a question of intent. Unquestionably, Congress could clearly express its will that prior violations should be punished even though they were no longer criminal, and that will would be given effect. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 333; *Stevens* v. *Dimond*, 6 N. H. 330, 332. Or, Congress could, by a general enactment, state that to be its will with respect to all temporary enactments, and that expression of Congressional intent would be given effect even though the particular temporary Act was silent. Cf. *Hertz* v. *Woodman*, 218 U. S. 205, 216. The present case, assuming as did the District Court that the "First" Act had expired, presents the question whether Congress intended, by stating that "This Act shall cease to be in effect on June 16, 1937" (Section 13, before its amendment), in-

tended to absolve any person who prior to that date had violated the Act but had not been finally convicted therefor. Or, in other words, does the old common-law rule, that in the absence of specific provision a general legislative pardon is to be implied, represent a correct statement of the intention of Congress in passing this temporary statute? We believe that it does not.

The common-law rule, although categorically stated by Chief Justice Marshall, finds surprisingly little judicial support either before his statement or since that time. Maxwell, *Interpretation of Statutes* (6th ed. 1920), p. 728, also states it as the rule formerly prevailing in England, but without exception the authorities which he cites deal with the *repeal* of statutes, rather than their *expiration*. Indeed, it may well be doubted whether the statement in Maxwell is correct. In *Stevenson* v. *Oliver*, 8 M. & W. 234 (1841), 151 Eng. Rep. 1024, both Abinger, C. B., and Alderson, B., stated their belief, *obiter*, it is true, that offenses committed against a temporary Act while it was in force could be punished thereafter. In 1921, in *Rex* v. *Ellis*, 125 L. T. R. 397, Darling, J., states that the views of Abinger and Alderson might be "perfectly reasonable" had not the contrary been settled by *Rex* v. *McKenzie*, Russ. & R. 429 (1820), 168 Eng. Rep. 881, apparently ignoring the fact that *Rex* v. *McKenzie* dealt with a repeal, and not an expiration. See also Bishop, *Statutory Crimes* (2d ed. 1883), Sec. 182.

But whatever be the historical basis for the rule stated in *The Irresistible* and *The General Pinkney*, we believe that it no longer represents Congressional intent with respect to temporary statutes. There is, in fact, almost conclusive evidence that it does not.

The most persuasive fact is the Congressional treatment of the parallel rule of the common law that the repeal of a statute automatically terminated all prosecutions under it, in the absence of a saving clause. The two rules—if, indeed, they can be said to be any more than two aspects of a single rule—are always stated together. For example, in Maxwell, the common-law rule is expressed as follows (p. 728):

> Where an Act expired or was repealed, it was formerly regarded, in the absence of provision to the contrary, as having never existed, except as to matters and transactions past and closed.

And in *The General Pinkney, supra,* Chief Justice Marshall stated the rule as follows (5 Cranch at p. 282):

> * * * it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.

Any expression of legislative intent with respect to the repeal of statutes, in other words, should be almost necessarily equally indicative of the legislative intent with respect to the expiration of a temporary act. And, so far as repeals are concerned, the evidence of intent is not wanting. Congress, in common with practically every legislative body formerly governed by the common-law rule, has expressly abrogated it.

Historically, one of the last pronouncements of the rule came from this Court in 1870, in *United States* v. *Tynen*, 11 Wall. 88. Congress immediately passed a statute by which the rule was changed (Act of February 25, 1871, c. 71, 16 Stat. 431). That law, later Section 13 of the Revised Statutes, has since remained as an express legislative rejection of the presumption which the common law had made. Similar express rejections of the arbitrary assumption as to legislative intent have been made by the legislatures of 43 of the 48 States, by England (Interpretation Act of 1889, 52 & 53 Vict., c. 63, Sec. 38 (2)), by Canada and by its provinces, by Australia and by its provinces, and by other legislative bodies.[5] A more apparent example of legislative disagreement with a common-law rule would be difficult to find.

Section 13 of the Revised Statutes does not in terms apply to the expiration of a criminal statute.

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[5] See Appendix B, *infra*.

But realistically Congress cannot be said to have one intention when it repeals a statute and a diametrically opposite one when it provides at the beginning that the law shall be in effect only until a day certain in the future. The latter might equally well be called a repeal as of a future date, yet certainly R. S., Section 13 applies when a repeal is not to take effect immediately but at a stated time in the future. There is nothing inherent in a "temporary" statute that warrants the creation of an intention in Congress different from that which it has toward "permanent" Acts later repealed. From every point of view, when Congress stated in R. S., Section 13 that it did not intend a repeal to operate as a legislative pardon, it made clearly evident that it had the same intention with respect to the dates it might set for expiration of temporary statutes. See *Sims* v. *United States,* 121 Fed. 515, 517. The language of Mr. Justice Holmes in *Johnson* v. *United States,* 163 Fed. 30, 32 (C. C. A. 1st) quoted in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* No. 364, decided February 27, 1939, is peculiarly appropriate:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set

> out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

See also *Funk* v. *United States,* 290 U. S. 371, 381; *Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 350; Landis, James J., *Statutes and the Sources of Law,* in Harvard Legal Essays, p. 213.

Indeed, from a practical point of view, there are even stronger reasons for believing that Congress would intend prosecutions to continue after a temporary statute had expired than after a permanent statute had been repealed. Under the common-law rule with respect to ~~requisite~~ REPEALS and expirations the legislature is deemed to intend that prosecutions be dismissed even if they are pending on appeal. Cf. *Massey* v. *United States,* 291 U. S. 608; *Hartung* v. *People,* 22 N. Y. 95; *Commonwealth* v. *Duane,* 1 Binney (Pa.) 601; *Lewis* v. *Foster,* 1 N. H. 61; *Key* v. *Goodwin,* 4 Moore & Payne Rep. (C. P.) 341 (1830). Hence there is an unavoidable period of perhaps even years between a violation and the final disposition of a prosecution. Consequently, when a statute makes known in advance its date of expiration, it is, under that rule, completely devoid of sanction long before that time. Violations of a law could be committed with impunity within a period of months or years before its termination. A two-year statute, such as the present Act, would have

almost no effective operation at all. Particularly, of course, is this true if one accepts the conclusion of the District Court in the present case, that even an extension of the statute is ineffective to continue prosecutions for acts done before its original date of expiration. If Congress, having regard to the "serious consequence sometimes incident to" the common-law rule of construction as to repeals (*Hertz* v. *Woodman, supra*), has expressly abrogated that rule, it must to an even greater extent have disapproved the rule which would render almost completely nugatory a temporary statute limited to a time less than that ordinarily required to complete a prosecution. As applied to an Act limited, like the present "First' Act, to two years, the common-law rule conflicts with the principle that no statute should be given a construction which would render it ineffective if another construction is possible. *Bird* v. *United States,* 187 U. S. 118.

Moreover, there was a certain amount of plausibility to the common-law rule that the repeal of a statute terminated all pending prosecutions under it, which does not exist in the rule as applied to temporary statutes. Disregarding the legalistic mold in which the doctrine was cast, a court might reasonably feel that a legislature, having, by a repeal, indicated its dissatisfaction with a statute, intended to treat it for all purposes as if it had never existed. "The repeal of the law imposing the

penalty is of itself a remission." *Maryland* v. *Baltimore & Ohio R. Co.*, 3 How. 534, 552. Obviously, however, the same intent cannot be imputed to a legislature which enacts a termination date at the same time as it enacts the statute itself.

The decision in *United States* v. *Chambers*, 291 U. S. 217, is not to the contrary. In that case the Court held that the common-law rule should be applied to the construction of the Twenty-first Amendment, and that all prosecutions under the former statutes were at an end. The distinction is one of *power* as against *intent*. In the *Chambers* case Congressional power had ceased because the people had withdrawn that power. Here, on the other hand, the question of power is not in issue: the sole question is one as to the intent of Congress.

B. THE AMENDMENT OF THE ACT IN 1937 CONSTITUTES A "PARTICULAR PROVISION" FOR THE CONTINUANCE OF THE PROSECUTIONS UNDER THE ORIGINAL ACT

Even if we accept, as we have done in the preceding subsection, the conclusion of the District Court that there was a "First" and a "Second" Act, and its further conclusion with which we have taken issue in that subsection, that violation of the "First" Act could not be punished after its expiration "unless a particular provision be made by law for the purpose" (*The Irresistible, supra*, 7 Wheat. 551), nevertheless we submit that the conclusion reached

by the District Court was erroneous. The 1937 amendment is, in every sense, "a particular provision" which has kept the statute alive for all purposes. It was passed before the original expiration date. Its necessary effect, as well as its explicit statement of purposes in its title (see p. 9, *supra*), was to continue to vivify the "First" Act. There is no warrant whatever for a construction of the "Second" Act which would at once admit that the same acts continue to be prohibited but deny that those acts committed prior to the amendment are no longer punishable.

The contention has sometimes been made that where a criminal statute is amended in some particular during the pendency of a prosecution, Congress by the amendment has intended to absolve an offender under the old statute. The contention has uniformly been rejected. *Schenck* v. *United States,* 249 U. S. 47, 53; *Goublin* v. *United States,* 261 Fed. 5 (C. C. A. 9th); *De Four* v. *United States,* 260 Fed. 596, 599–600 (C. C. A. 9th), certiorari denied, 253 U. S. 487; *Sage* v. *State,* 127 Ind. 15; *People* v. *Schoenberg,* 161 Mich. 88; *Hair* v. *State,* 16 Neb. 601. If, in those cases, Congress is deemed not to have intended those who violated the earlier Act should escape liability, *a fortiori,* here, when Congress has not changed but has simply extended the Act for all purposes, the same results should follow.

CONCLUSION

We submit, therefore, that the decision of the court below should be reversed.

Respectfully submitted.

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APRIL 1939.

APPENDIX A

Connally (Hot Oil) Act of February 22, 1935, c. 18, 49 Stat. 30 (U. S. C. Supp. IV, Title 15, Sec. 715-715*l*):

AN ACT To regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to be the policy of Congress to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil as herein defined, and to encourage the conservation of deposits of crude oil situated within the United States.

SEC. 2. As used in this Act—

(1) The term "contraband oil" means petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State, or any of the products of such petroleum.

(2) The term "products" or "petroleum products" includes any article produced or derived in whole or in part from petroleum or any product thereof by refining, processing, manufacturing, or otherwise.

(3) The term "interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, or from any place in the United States to a foreign country, but only insofar as such commerce takes place within the United States.

(4) The term "person" includes an individual, partnership, corporation, or joint-stock company.

SEC. 3. The shipment or transportation in interstate commerce from any State of contraband oil produced in such State is hereby prohibited. For the purposes of this section contraband oil shall not be deemed to have been produced in a State if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State.

SEC. 4. Whenever the President finds that the amount of petroleum and petroleum products moving in interstate commerce is so limited as to be the cause, in whole or in part, of a lack of parity between supply (including imports and reasonable withdrawals from storage) and consumptive demand (including exports and reasonable additions to storage) resulting in an undue burden on or restriction of interstate commerce in petroleum and petroleum products, he shall by proclamation declare such finding, and thereupon the provisions of section

3 shall be inoperative until such time as the President shall find and by proclamation declare that the conditions which gave rise to the suspension of the operation of the provisions of such section no longer exist. If any provision of this section or the application thereof shall be held to be invalid, the validity or application of section 3 shall not be affected thereby.

SEC. 5. (a) The President shall prescribe such regulations as he finds necessary or appropriate for the enforcement of the provisions of this Act, including but not limited to regulations requiring reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products, and providing for the keeping of books and records, and for the inspection of such books and records and of properties and facilities.

(b) Whenever the President finds it necessary or appropriate for the enforcement of the provisions of this Act he shall require certificates of clearance for petroleum and petroleum products moving or to be moved in interstate commerce from any particular area, and shall establish a board or boards for the issuance of such certificates. A certificate of clearance shall be issued by a board so established in any case where such board determines that the petroleum or petroleum products in question does not constitute contraband oil. Denial of any such certificate shall be by order of the board, and only after reasonable opportunity for hearing. Whenever a certificate of clearance is required for any area in any State, it shall be unlawful to ship or transport petroleum or petroleum products in inter-

state commerce from such area unless a certificate has been obtained therefor.

(c) Any person whose application for a certificate of clearance is denied may obtain a review of the order denying such application in the United States District Court for the district wherein the board is sitting by filing in such court within thirty days after the entry of such order a written petition praying that the order of the board be modified or set aside, in whole or in part. A copy of such petition shall be forthwith served upon the board, and thereupon the board shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript, such court shall have jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the board shall be considered by the court unless such objection shall have been urged before the board. The finding of the board as to the facts, if supported by evidence, shall be conclusive. The judgment and decree of the court shall be final, subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347).

SEC. 6. Any person knowingly violating any provision of this Act or any regulation prescribed thereunder shall upon conviction be punished by a fine of not to exceed $2,000 or by imprisonment for not to exceed six months, or by both such fine and imprisonment.

SEC. 7. (a) Contraband oil shipped or transported in interstate commerce in violation of the provisions of this Act shall be liable to be proceeded against in any district

court of the United States within the jurisdiction of which the same may be found, and seized for forfeiture to the United States by a process of libel for condemnation; but in any such case the court may in its discretion, and under such terms and conditions as it shall prescribe, order the return of such contraband oil to the owner thereof where undue hardship would result from such forfeiture. The proceedings in such cases shall conform as nearly as may be to proceedings in rem in admiralty, except that either party may demand a trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States. Contraband oil forfeited to the United States as provided in this section shall be used or disposed of pursuant to such rules and regulations as the President shall prescribe.

(b) No such forfeiture shall be made in the case of contraband oil owned by any person (other than a person shipping such contraband oil in violation of the provisions of this Act) who has with respect to such contraband oil a certificate of clearance which on its face appears to be valid and to have been issued by a board created under authority of section 5, certifying that the shipment in question is not contraband oil, and such person had no reasonable ground for believing such certificate to be invalid or to have been issued as a result of fraud or misrepresentation of fact.

SEC. 8. No common carrier who shall refuse to accept petroleum or petroleum products from any area in which certificates of clearance are required under authority of this Act, by reason of the failure of the shipper to deliver such a certificate to such

carrier, or who shall refuse to accept any petroleum or petroleum products when having reasonable ground for believing that such petroleum or petroleum products constitute contraband oil, shall be liable on account of such refusal for any penalties or damages. No common carrier shall be subject to any penalty under section 6 in any case where (1) such carrier has a certificate of clearance which on its face appears to be valid and to have been issued by a board created under authority of section 5, certifying that the shipment in question is not contraband oil, and such carrier had no reasonable ground for believing such certificate to be invalid or to have been issued as a result of fraud or misrepresentation of fact, or (2) such carrier, as respects any shipment originating in any area where certificates of clearance are not required under authority of this Act, had no reasonable ground for believing such petroleum or petroleum products to constitute contraband oil.

SEC. 9. (a) Any board established under authority of section 5, and any agency designated under authority of section 11, may hold and conduct such hearings, investigations, and proceedings as may be necessary for the purposes of this Act, and for such purposes those provisions of section 21 of the Securities Exchange Act of 1934 relating to the administering of oaths and affirmations, and to the attendance and testimony of witnesses and the production of evidence (including penalties), shall apply.

(b) The members of any board established under authority of section 5 shall be appointed by the President, without regard to the civil service laws but subject to the

Classification Act of 1923, as amended; and any such board may appoint, without regard to the civil service laws but subject to the Classification Act of 1923, as amended, such employees as may be necessary for the execution of its functions under this Act.

SEC. 10. (a) Upon application of the President, by the Attorney General, the United States District Courts shall have jurisdiction to issue mandatory injunctions commanding any person to comply with the provisions of this Act or any regulation issued thereunder.

(b) Whenever it shall appear to the President that any person is engaged or about to engage in any acts or practices that constitute or will constitute a violation of any provision of this Act or of any regulation thereunder, he may in his discretion, by the Attorney General, bring an action in the proper United States District Court to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

(c) The United States District Courts shall have exclusive jurisdiction of violations of this Act or the regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or the regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this Act or regulations thereunder, or to enjoin any violation of this Act or any regulations thereunder, may be brought in any such district or in the

district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347).

SEC. 11. Wherever reference is made in this Act to the President, such reference shall be held to include, in addition to the President, any agency, officer, or employee who may be designated by the President for the execution of any of the powers and functions vested in the President under this Act.

SEC. 12. If any provision of this Act, or the application thereof to any person or circumstance, shall be held invalid, the validity of the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 13. This Act shall cease to be in effect on June 16, 1937. Approved, February 22, 1935.

Act of June 14, 1937, c. 335, 50 Stat. 257 (U. S. C., Supp. IV, Title 15, sec. 715l):

AN ACT To continue in effect until June 30, 1939, the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 of the Act entitled "An Act to regulate interstate and foreign commerce in pe-

troleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935, is amended by striking out "June 16, 1937" and inserting in lieu thereof "June 30, 1939".

Approved, June 14, 1937.

Section 13, Revised Statutes (U. S. C., Title 1, Sec. 29):

§ 29. *Repeal of statutes as affecting existing liabilities.*—The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. (R. S. § 13.)

From Act Feb. 25, 1871, c. 71, § 4, 16 Stat. 432.

APPENDIX B

Statutes which have expressly abrogated the common-law rule as to the effect of the repeal of a statute on prior violations:

ALABAMA: Code (Mitchie, 1928), Section 5532.

ARIZONA: Revised Code (Struckmeyer, 1928), Section 3046.

ARKANSAS: Statutes (Pope, 1937), Section 13283.

CALIFORNIA: Political Code (1937), Section 329.

COLORADO: Ann. Statutes (Mitchie, 1935), Chapter 159, Section 4.

CONNECTICUT: Gen. Statutes (1930), Section 6561.

FLORIDA: Constitution, Article III, Section 32.

GEORGIA: Code (1936), Title 26, Section 103.

HAWAII: Revised Laws (1935), Section 27.

IDAHO: Code (1932), Section 65–513.

ILLINOIS: Statutes (Jones, 1934), Section 27.16.

INDIANA: Statutes Ann. (Burns, 1933), Section 1–307.

IOWA: Code (1935), Section 63 (1).

KANSAS: General Statutes (Corrick, 1935), Section 77–201 (first).

KENTUCKY: Statutes (Carroll, 1936), Section 465.

MAINE: Revised Statutes (1930), Chapter 1, Section 5.

MARYLAND: Code (Bagby, 1924), Article 1, Section 3.

MASSACHUSETTS: General Laws (1932), Chapter 4, Section 6 (second).

MICHIGAN: Statutes Annotated (Henderson, 1936), Section 2.214.

MINNESOTA: Statutes (Mason, 1927), Section 10930.

MISSISSIPPI: Code (1930), Section 1361.
MISSOURI: Statutes Annotated (1932) Section 662.
MONTANA: Revised Codes (1935) Chapter 5, Section 97.
NEBRASKA: Compiled Statutes (1929) Section 49–301.
NEVADA: Compiled Laws (Hillyer, 1929) Section 11265.
NEW HAMPSHIRE: Public Laws (1926) Chapter 2, Section 36.
NEW JERSEY: Revised Statutes (1937) Section 1:1–15.
NEW MEXICO: Constitution, Art. IV, Section 33.
NEW YORK: Consolidated Laws (Baldwin, 1938), General Construction, Section 93.
NORTH CAROLINA: Code (1935) Section 3948.
NORTH DAKOTA: Compiled Laws (1913) Section 7316.
OHIO: General Code (Page, 1937), Section 26.
OKLAHOMA: Constitution, Article 5, Section 54; Statutes (1931), Section 13511.
OREGON: Annotated Code (1930) Section 14–1008.
RHODE ISLAND: General Laws (1923) Section 417.
SOUTH DAKOTA: Compiled Laws (1929) Section 39.
TENNESSEE: Code (Mitchie, 1938) Section —.
UTAH: Revised Statutes (1933) Section —.
VERMONT: Public Laws (1933) Section 33.
VIRGINIA: Code (1936) Section 6.
WASHINGTON: Revised Statutes (Remington, 1932) Section 2006.
WEST VIRGINIA: Code (1937) Section 31.
WISCONSIN: Statutes (1937) Section 370.04.
WYOMING: Revised Statutes (1931) Section 112–104.

CANADA—Revised Statutes (1927) Chapter 1, Section 19:

ALBERTA: Revised Statutes (1922) Chapter 1, Section 13 (b).

BRITISH COLUMBIA: Revised Statutes (1936) Chapter 1, Section 13 (1) (b).

MANITOBA: Revised Statutes (1913) Chapter 105, Section 31.

NEW BRUNSWICK: Consolidated Statutes (1927) Chapter 1, Section 31.

NEWFOUNDLAND: Consolidated Statutes (1936) Chapter 1, Section 8 (c).

NORTHWEST TERRITORIES: General Ordinance (1905) Interpretation; Section 52.

NOVA SCOTIA: Revised Statutes (1923) Chapter 1, Section 12.

ONTARIO: Revised Statutes (1937) Chapter 1, Section 14 (d).

SASKATCHEWAN: Revised Statutes (1930) Chapter 1, Section 39 (c).

AUSTRALIA—LAWS (McGrath & Sullivan, 1932) Acts Interpretation Act, Section 8 (d):

NEW SOUTH WALES: Incorporated Acts (1933) Vol. 10, p. 373, Section 8 (c).

QUEENSLAND: Statutes (1911) Vol. III, p. 3055, Section 5.

SOUTH AUSTRALIA: Statutes, 1837–1936 (1937) Acts Interpretation Act, Vol. I, p. 62, Section 16 (1) IV.

TASMANIA: Public General Act, 1826–1936 (1936) Acts Interpretation Act, Vol. I, p. 14, Section 16 (1) IV.

VICTORIA: Statutes (1929) Vol. I, p. 38, Section 6 (2) (d).

WESTERN AUSTRALIA: Acts, 1918, Interpretation, p. 12, Section 16 (1) (e).

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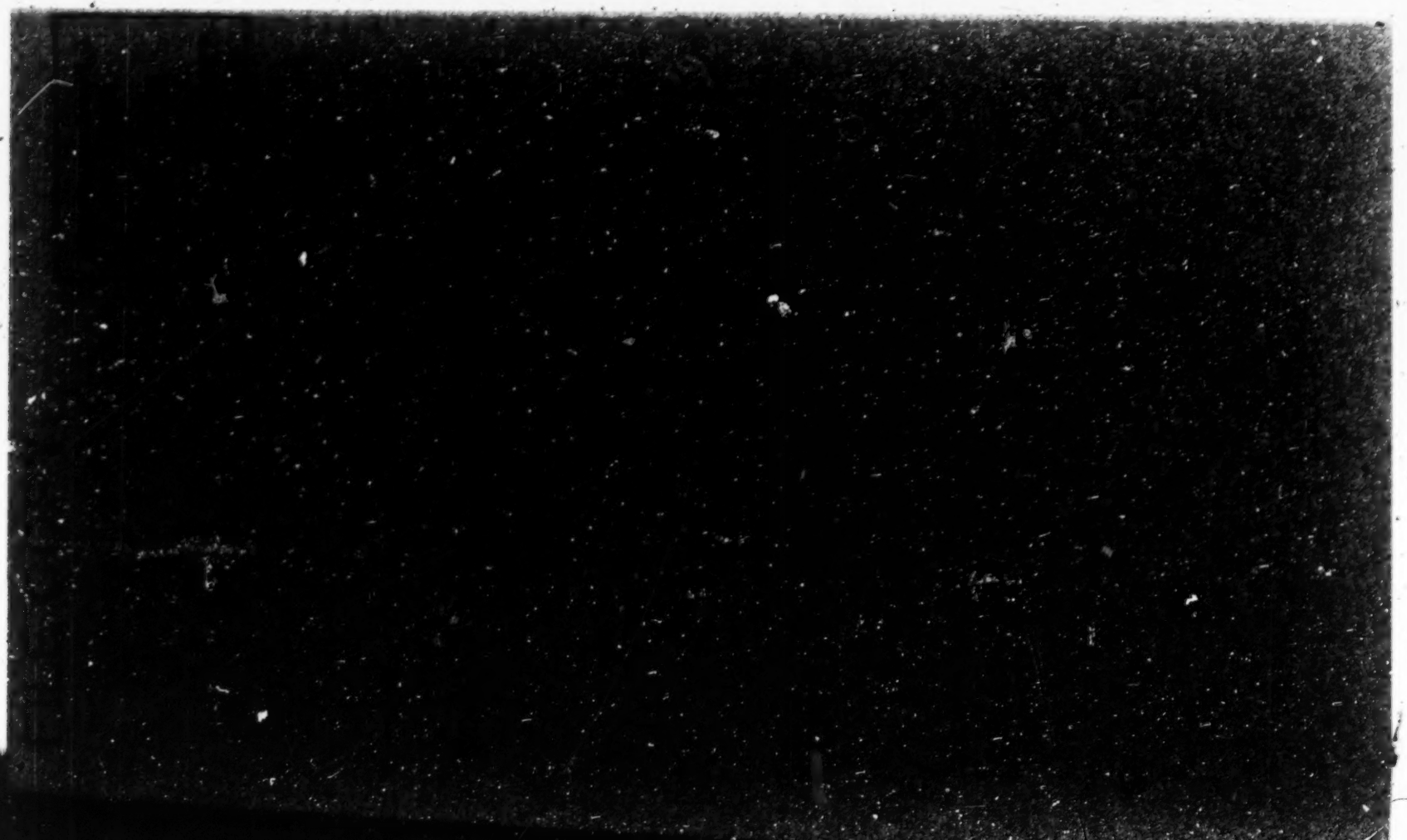

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CITATIONS

141354—39

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 687

THE UNITED STATES OF AMERICA, APPELLANT

v.

NEAL POWERS AND RENE ALLRED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

The brief filed on behalf of the defendants presents two arguments which may not adequately have been discussed in our principal brief.

I

Defendants contend that no effect can be given to the amending Act of June 14, 1937, by which the Connally Act was extended from June 16, 1937, to June 30, 1939. The amending Act, it is argued, must be given "prospective" application only; that is, it must be treated as making the same acts criminal for another two years, but not as preserving any penalties or liabilities which had already accrued.

We have already pointed out in our principal brief (pp. 8–9) that the basis upon which the defendants' argument rests—that there are two separate and distinct Connally Acts—cannot be sustained. There is no question, therefore, of "prospective" or "retroactive" application of a "second" Act. Congress has simply changed the expiration date of a temporary statute from June 16, 1937, to June 30, 1939, and has maintained until that time the statutory support for all prosecutions.

But defendants now urge that the 1937 amendment cannot even continue existing authority for the prosecution of offenses, since if the amendment were construed to do so it would constitute an *ex post facto* law in violation of Article I, Section 9, of the Constitution. The contention is based upon two assumptions: (1) That the expiration of a temporary statute operates like a statute of limitations, and bars further prosecution; and (2) that Congress may not constitutionally extend a statute of limitations as to offenses previously committed, even though the original period had not expired before the extension was made. Neither assumption can be supported.

The first assumption has been discussed in our principal brief (pp. 16–24), where we have contended that this Court should reject the common-law presumption that a temporary statute is intended to grant a legislative pardon to all offenders not finally convicted on its expiration date. If that

argument is accepted, there is no necessity in the present case for relying upon the extension of the Act at all, and defendants' present contention becomes moot.

But even if it be assumed that Congress, by setting an expiration date for a statute, intended to grant a legislative pardon to all offenders against such a statute who are not finally convicted on that date, a change of that expiration date by a subsequent Congress is not an *ex post facto* law. A similar contention occasionally has been raised with respect to the extension of statutes of limitations. Without exception, when the period of limitations has not expired before the amendment, the period has been treated as simply a question of procedure which may be extended in the discretion of the legislature. See *Beazell* v. *Ohio*, 269 U. S. 167, 171.

Falter v. *United States*, 23 F. (2d) 420 (C. C. A. 2d), certiorari denied, 277 U. S. 590, seems to be the only case in which the question has been raised in a Federal court. There the defendants were charged with conspiring to defraud the United States, the crime having been committed in 1919. In 1921 the period of limitations for the crime was extended from 3 to 6 years. The court held that, since the original period of limitations had not run when the amendment extending the period was enacted, the amendment was not an *ex post facto* law. Judge Learned Hand stated (23 F. (2d) at pp. 425–426):

> Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it.[1]

Several state courts have also reached the same result. In *Commonwealth* v. *Duffy*, 96 Pa. 506, the court stated (p. 514):

> Now an act of limitation is an act of grace purely on the part of the legislature. Especially is this the case in the matter of criminal prosecutions. The state makes no *contract* with criminals, at the time of the passage of an act of limitation, that they shall

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[1] Congress had considered the question when it passed the amendment extending the period, and had reached the same conclusion as the court—that the extension should apply to offenses not then barred. The amendment states (Act of November 17, 1921, c. 124, 42 Stat. 220:

"* * * This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

The Solicitor General, James M. Beck, had prepared for Congress a memorandum stating that this proviso was constitutional. See H. Rept. No. 365, 67th Cong., 1st Sess.; 61 Cong. Rec. 7061.

> have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the mere will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare. Such being the character of this kind of legislation, we hold that in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws. A law enlarging or repealing a statutory bar against criminal prosecutions may, therefore, apply as well to past as to future cases if its terms include both classes. Such legislation relates to the remedy only and not to any property right or contract right.

See also *People* v. *Buckner*, 281 Ill. 340, 347; *Moore* v. *State*, 43 N. J. Law 203, 213; *Ex parte Larkin*, 1 Okla. 53. The decision in *People* v. *Lord*, 12 Hun 282 (Sup. Ct.), upon which the defendants rely, is not to the contrary. It dealt solely with a question of construction. Other cases in New York are in accord with *Commonwealth* v. *Duffy* and *Falter* v. *United States*. See *People ex rel. Pincus* v. *Adams*, 274 N. Y. 447, 455; *People ex rel. Reibman* v. *Warden*, 242 App. Div. 282, 284–286; *People* v. *Amann*, 159 Misc. 417, 419–422. See also *King* v. *Dharma*, [1905] 2 K. B. 335.

II

From the fact that a bill to make the Connally Act permanent, now pending before Congress, contains a saving clause with respect to past offenses, the defendants seek to draw the conclusion that the absence of such a saving clause in the 1937 amendment indicated the Congressional intent that prosecutions were not to be maintained for violations committed prior to the 1937 amendment. If a bill which has not yet become a law is any evidence at all of Congressional intent, we submit that the inclusion in it of a saving clause indicates clearly that Congress never intended that violations of the Connally Act should go unpunished so long as that Act was continued in force. This is particularly evident from the provision in Section 2 of the proposed Act which specifically authorizes the continuance of prosecutions for offenses committed prior to the 1937 amendment. Since it is extremely unlikely that Congress intended to revive prosecutions already barred, the language rather clearly expressed its view that the Connally Act had not at any time ceased to be in force and hence that prosecutions for its violation could still be maintained.

Actually, it is more probable that Section 2 was included in the proposed Act because the decision of the District Court in the instant case, if it were to prevail, would completely defeat the intent of Congress. Its inclusion upon the first judicial intimation of its necessity is most persuasive that Con-

gress does not intend that violators of a statute which it has continued in force shall be granted amnesty.

Respectfully submitted.

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APPELLEE'S BRIEF

NO. 687

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, *Appellant*,

VERSUS

NEAL POWERS AND RENE ALLRED, *Appellees*.

BRIEF FOR APPELLEES, NEAL POWERS AND RENE ALLRED

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NEAL POWERS AND RENE ALLRED, *Appellees*.

BRIEF FOR APPELLEES, NEAL POWERS AND RENE ALLRED

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

INTRODUCTORY STATEMENT

Appellees do not question the jurisdiction of this court on this appeal, but conceive that the decision of the trial court was correct.

Appellees, defendants in the court below, are charged by indictment under the first count of a conspiracy under Revised Statutes, Section 5440, as amended (U. S. C. A., Title 88), to violate the Act of February 22, 1935,

being Chap. 18, 49 Stat. 30 (U. S. C. A., Title 15, Chap. 15A, p. 185, Current Pocket Part), and in nine counts of substantive offenses under said latter act.

The act involved is the Connally Act prohibiting transportation in interstate commerce oil and petroleum products produced in violation of a state law or regulation.

The Connally Act of February 22, 1935 was a temporary act, and Section 13 of the Act provided that the act should cease to be in effect June 16, 1937. There was no provision in the act saving penalties accruing during the continuation of the act after its expiration date.

On June 14, 1935, two days before the expiration of the act of February 22, 1935, the Section 13 was amended by the Act of June 14, 1937, Chap. 335, 50 Stat. 357, providing that the act should cease to be effective on June 30, 1939.

The conspiracy and all the acts charged in the indictment were consummated prior to June 14, 1937, or in other words prior to the effective date of the act extending the expiration date of the Connally Act.

QUESTIONS PRESENTED

This Court on this appeal is to determine whether or not the trial court was correct in holding,—

(1) That the right and power of the court to punish offenses committed in violation of a temporary act

would lapse upon the expiration of the temporary act in absence of a saving clause in the original act continuing prosecutions for offenses committed prior to the date the act would have expired; and

(2) That a retroactive effect would not be given to the extension Act of June 14, 1937, and in absence of an expressed declaration in the act itself, the court would not impute to Congress an intention to extend the time within which a prosecution could be brought for an offense which had but two days remaining before same would become completely barred.

The questions presented and determined by the trial court do not involve the power of Congress, but if it be established that offenses under a temporary act fall with the expiration of the act, then the question is, as stated by the Government in its brief, what was the intention of Congress in extending the expiration date in absence of an express declaration of such intention in the extension act.

The trial court has held, and it is appellees' contention that the holding is correct, that, in absence of such expressed declaration, the act is to be construed prospectively as applying to future offenses and not retroactively to past offenses.

It is the Government's contention that the trial court was in error, and that, in the absence of an express declaration by Congress, a retroactive intent and effect is to be read into the extending act, and the act is to be

construed so as to apply to past offenses and to continue offenses which when the act became effective (June 14, 1937) would have become wholly barred in two days.

PRELIMINARY DISCUSSION

The Government in support of its position relies chiefly upon early English cases decided long prior to the adoption of the Constitution of the United States. There are certain fudamental concepts of Government held by those men in a democracy who have a proper respect for the laws of which they are the common authors, and who recognize the power of the state as necessary but not divine. The merits of our written Constitution over the English Constitution has generally been recognized as lying chiefly in the fact that the people of the United States in prescribing the powers of Congress placed in the Constitution express limitations for the protection of their inalienable rights. The inhibition of Article 1, Sec. 9, Par. 3, against *ex post facto* laws brought to our jurisprudence a corollary rule that justice demanded that in absence of a clear intent, laws were to be applied prospectively and not retroactively.

The power of Congress before a right becomes fixed or vested to legislate retroactively is recognized, but it has seldom been exercised. And this Court has universally construed the Acts of Congress to apply prospectively, rather than retroactively.

The brief of the United States ignores what appellees conceive to be the well settled rules of construction as announced by this court, and the rule which Corpus Juris announces to be the general rule "except in jurisdictions where neither English nor American Common Law is in force." Sec. 16 Corpus Juris, p. 70, Sec. 34. They seek by inference to apply to the Connally Act some peculiar and unusual construction.

As a matter of fact the Connally Act, its history, its purpose, and all the surrounding circumstances give strength to and support the decision of the trial court.

There is nothing inherently wrong or evil in the act of a man who produces from his own land his own oil in whatever quantities he desires. The act even when it transgresses a written statute may hardly be said to involve moral turpitude. The propriety and necessity for governmental supervision to prevent the physical waste of natural resources has always been recognized. But the theory that hard times are the outgrowth of a bountiful surplus is a philosophical outgrowth of a new economy. "Economic waste" is another term for "low price," and with the advent of the East Texas oil field, The State of Texas pioneered in proration laws whose accepted and avowed purpose is to maintain the price of petroleum and its products. The ordinary citizen whose only interest in the oil business is that gasoline shall be as cheap as possible may accept the high prices maintained by proration laws and feel it their duty to give those laws their honest and earnest support according

to the letter of the law. But there is nothing in the act itself which suggests or demands that the laws should be liberally construed so as to exact a penalty where none was intended.

When the Connally Act of 1935 was enacted Congress recognized the purposes of the act to be temporary. It was specially limited to expire within two years. Congress recognized that with the return of normal conditions, people would probably desire to return to normal and accepted economic theories. It can hardly be assumed without some express declaration that Congress intended that when it should no longer be unlawful for a man to transport his own property, in which there was no inherent vice, that, after the act ceased to be unlawful, he could be indicted and punished for the act which would no longer be forbidden.

PROPOSITIONS OF LAW

In opposition to the Specifications of Error advanced by the appellant, appellees submit the following propositions of law,—

PROPOSITIONS

FIRST

An indictment charging an offense prohibited by a temporary act brought after the temporary act has expired under its own terms, for things done prior to the

expiration of the temporary act, cannot be maintained, where there is no saving clause in such temporary act continuing the offense theretofore committed after the expiration of the act under its own terms.

SECOND

An indictment for violation of the Connally Act of 1935 for transporting oil in Interstate Commerce which is alleged to have been produced in violation of the Texas proration law of 1935, and which indictment was not brought until September 17, 1938, cannot be maintained, since the Connally Act of 1935 expired under its own terms on June 16, 1937, and there was no saving clause in either act continuing offenses committed while the acts were in force after the act had expired.

THIRD

Criminal statutes passed after the commission of an offense are to be construed prospectively as applying to offenses committed in the future and not retroactively so as to cover past offenses unless the contrary intention clearly appears from the act.

FOURTH

The Federal Act of 1937 extending the provisions of the Connally Act of 1935 until June 30, 1939, did not apply to offenses committed under the original act and did not have the retroactive effect of continuing

the offenses committed prior to its passage, since the acts contained no saving clause, and said extension acts applied only to violations of the statutes occurring after their passage.

FIFTH

Section 13, of the Revised Statutes of the United States, being U. S. C. A., Section 29 (containing a general savings clause), does not apply to temporary acts expiring under their own terms, but only applies to repealed statutes.

SIXTH

Offenses committed under the Connally Act of 1935 are not continued after the expiration of the Act under its own terms by Section 13, of the Revised Statutes of the United States, because the Connally Act was a temporary act.

ARGUMENT UNDER FOREGOING PROPOSITIONS

I.

To the Effect that the right to prosecute for offenses committed under the Connally Act of 1935 has lapsed.

AUTHORITIES

The Irresistible, 7 Wheat (U. S.) 551, 5 L. ed. 520;

United States vs. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255;

United States vs. Curtiss-Wright Export Corp., 14 Fed. Supp. 230;

Missouri-Pac. R. Co. vs. United States, 16 Fed. Supp. 752 (D. C., E. D. Mo., Three Judge Court);

South Carolina vs. Gaillard, 101 U. S. 433, 25 L. ed. 937;

Baltimore & Pacific R. R. Co. vs. Grant, 98 U. S. 398, 25 L. ed. 231;

National Exchange Bank vs. Peters, 144 U. S. 573, 36 L. ed. 545;

Sherman vs. Grinnell, 123 U. S. 679, 31 L. ed. 278;

Gunnee vs. County of Patrick, 137 U. S. 145, 34 L. ed. 601;

U. S. vs. Chambers, 291 U. S. 217, 78 L. ed. 763, 54 Sup. Ct. 434;

Moore vs. U. S., 85 Fed. 765, 29 C. C. A. 269;

U. S. vs. Baum, 74 Fed. 43;

Federal Land Bank vs. United States Bank, 13 Fed. (2) 36;

14 Am. Jur., Sec. 21;

16 Corpus Juris, p. 70, Sec. 34;

Revised Statutes of the United States, Sec. 13;

U. S. C. A., Title 1, Sec. 29 (Act of Feb. 25, 1871, Ch. 71, Sec. 4; 16 Stat. 432);

U. S. vs. Reisinger, 128 U. S. 403, 32 L. ed. 480;

Great Northern R. Co. vs. United States, 208 U. S. 452, 52 L. ed. 567;

Landen vs. U. S., 299 Fed. 75;

Goublin vs. U. S., 261 Fed. 5.

ARGUMENT

In order to clearly understand the issues involved on this question, it is necessary to understand clearly the facts. The indictment is predicated upon a violation of the Connally Act of 1935, for alleged transportation of oil alleged to have been produced in excess of the amount permitted by the Texas Proration Law of 1935. Both the Connally Act and the Texas Act were temporary acts, expiring under their own terms in 1937. None of the alleged offenses or acts upon which the offenses were predicated occurred after the expiration of the two acts. The question then arises as to whether the offenses would continue, or rather would indictment lie, or a prosecution be supported after the expiration of the acts.

The question as to whether the amendatory act had the effect of extending the offenses is another question, which will be discussed under the next propositions.

The general rule is stated in 16 Corpus Juris, p. 70, Sec. 34, that "if a penal statute is repealed without a saving clause, there can be no prosecution or punishment

for violation of it before the repeal." And in the next Section (35), it is said, "The repeal of an existing statute under which a proceeding is pending puts an end to the proceeding, unless it is saved by proper saving clause in the repealing statute."

The foregoing rule is applied to temporary acts which expire by their own terms. In the case of The Irresistable, 7 Wheat. (U. S.) 551, 5 L. ed. 520, Chief Justice Marshall says:

> "Now, it is well settled, that an offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose."

This is the well recognized rule announced in U. S. vs. Tynen, 11 Wallace 88, 95, 20 L. ed. 153; Yeaton vs. U. S. 5 Cranch, 281, 3 L. ed. 101.

That this is the Common Law Rule cannot be seriously disputed. But the only serious question is: Does the general savings clause of the Federal Statute, R. S. Sec. 13, being the Act of February 25, 1871, U. S. C. A., Title 1, Sec. 29, change the rule as to temporary acts?

R. S. Sec. 13, U. S. C. A., Title 1, Sec. 29, reads as follows:

> "The *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper ac-

tion or prosecution for the enforcement of such penalty, forfeiture, or liability."

This statute has been construed as to penalties which have arisen under repealed acts in the cases of U. S. vs. Reisinger, 128 U. S. 403, 32 L. ed. 480; Great Northern R. Co. vs. United States, 208 U. S. 452, 52 L. ed. 567; Landen vs. U. S., 299 Fed. 75; Goublin vs. U. S., 261 Fed. 5; Sims vs. U. S., 121 Fed 515.

If the Sims case, supra, is to be construed as holding what the Government contends, then it is clearly in conflict with Moore vs. U. S., 85 Fed. 465, 29 C. C. A. 269, which was expressly approved by the Supreme Court in U. S. vs. Chambers, 291 U. S. 217, 78 L. ed. 763, 54 Sup. Ct. 434. It is also in conflict with the declaration of this court in U. S. vs. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255.

It is apparent from an examination of the cases that R. S. Sec. 13 does not apply to offenses created by temporary acts which expire under their own terms.

The application of R. S. Sec. 13 to even repealed statutes has been very limited, and it is still the general rule that rights arising under statutes which are repealed without a saving clause deprive the court of jurisdiction over cases arising under the statute repealed. See: South Carolina vs. Gaillard, 101 U. S. 433, 25 L. ed. 937; Baltimore & Pacific Railroad Co. vs. Grant, 98 U. S. 398, 25 L. ed. 231; National Exchange Bank vs. Peters, 144 U. S. 573, 36 L. ed. 545; Sherman vs.

Grinnell, 123 U. S. 679, 31 L. ed. 278; Gurnee vs. County of Patrick, 137 U. S. 145, 34 L. ed. 601. All the foregoing cases were decided after the passage of the Act of February 25, 1871, R. S. Sec. 13.

But the foregoing cases were not cases where it was sought to enforce penalties. They are important only to illustrate the narrow limits within which R. S. Sec. 13 is applied.

It seems well settled that the R. S. Sec. 13 is limited in its application strictly to cases arising under statutes repealed, and as to statutes expiring under their own terms, the doctrine of The Irresistable, supra, is still the law. If this distinction is kept in mind, there is no difficulty with the cases.

An important case is the case of Moore vs. U. S., 85 Fed. 465, 29 C. C. A. 269. In 1895 Moore was indicted with others in a District Court of the territory of Utah, under Section 3 of the Act of 1890 (26 Stat. 209) prohibiting a combination in restraint of trade or commerce in any territory. It will be seen the act was of the same character as the Connally Act of 1935 in question in this case. In January, 1896, Utah became a state. A demurrer to the indictment was overruled by the District Court, but the Circuit Court of Appeals reversed and dismissed the case, because Utah was no longer a territory, and the prosecution could no longer be maintained. The court expressly held the R. S. Sec. 13, did not apply, but applied only to cases where the statute was repealed. The court said:

"Neither do we think the case comes within the provisions of Section 13 of the Revised Statutes. That section reads as follows: (quotes the statute).

"It is clear from the language of the section that it applies only to cases *where the statute defining an offense has been repealed.* The Act of July 2nd was not repealed by the enabling act, for it yet applies to the territories of the United States. It ceased to be in force in Utah only because it was superseded by the Constitution upon the admission of the State."

This case cites and expressly approves and applies the rule of The Irresistable, supra, after the adoption of the Act of 1871 (R. S., Sec. 13 General Saving Clause Act). And this Moore case in turn has been expressly approved by the Supreme Court in the Chambers case.

This latter case limiting R. S. Sec. 13 strictly to repeal of acts is U. S. vs. Chambers, 291 U. S. 217, 78 L. ed. 763, 54 S. Ct. 434. In that case it was held that a prosecution under the Volstead Act arising before the repeal of the Eighteenth Amendment could not be carried on after the amendment was repealed.

The Supreme Court cites the early decision with approval (Yeaton vs. U. S., supra, U. S. vs. Tynan, supra). It also approves Moore vs. U. S., supra (Utah case) and holds that R. S. Sec. 13, U. S. C. A. Title 1, Sec. 29, applies only to cases of statutes repealed by Congress.

The doctrine as to temporary acts is announced in a recent and authoritative case by a three-judge court in the Eastern District of Missouri. The court says:

"Title 1 of this Transportation Act (49 U. S. C. A. Sec. 251, et seq.) as its name implies, was emergency legislation. It has now expired by its own limitation . . . . When an act has thus expired, the effect upon past transactions is the same as if it were repealed at that time. In such cases, in absence of a saving clause, 'all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after'." See Missouri Pac. R. R. Co. vs. U. S., 16 Fed. Supp. 752, (D. C. 760).

An examination of two decisions, one by the district court, United States vs. Curtiss-Wright Export Corp., 14 Fed. Supp. 230, and the reversal of the case by the Supreme Court of the United States in United States vs. Curtiss-Wright Export Corp., 299 U. S. 304, 81 L. ed. 255, shows that this rule is approved by the Supreme Court.

May 28, 1934, Congress passed a resolution to prohibit the sale of arms or munitions of war to the nations engaged in Chaco. It prohibited the sale of arms in violation of such proclamation as might be issued by the President. The defendant was indicted for acts committed during the continuance of the President's proclamation. The proclamation had been revoked by subsequent proclamation after the commission of the alleged criminal acts.

The district court held that the resolution constituted an unlawful delegation of legislative authority to the President and sustained a demurrer to the indictment.

The court passed on the effect of R. S. Sec. 13, and held there was no difference in cases where the statute was repealed and where they expired under their own terms, and held that the general savings clause applied. In other words, the word "repeal" was not discussed by the court, and the court seems to treat the distinction as trivial.

The Supreme Court on direct appeal by the Government reversed the district court and held the power given the President was not an unlawful delegation of legislative power.

The court, however, on the other question of the expiration of a temporary act disagree with the reasoning of the lower court. The Supreme Court recognized the rule of "The Irresistable" case, and said:

> "The second proclamation of the President revoking the first proclamation, it is urged, had the effect of putting an end to the Joint Resolution, *and in accordance with a well settled rule, no penalty could be enforced or punishment inflicted thereafter for an offense committed during the life of the Joint Resolution in the absence of a provision in the resolution to that effect.* There is no doubt as to the general rule or as to the absence of a saving clause in the Joint Resolution. But is the case presented one which makes the rule applicable?"

The Court then cites and approves the splendid case of Stevens vs. Dimond, 6 N. H. 330, 332, which states the rule exactly. The Supreme Court says:

"There, a town by-law provided that if certain animals should be going at large between the first day of April and the last day of October, etc., the owner would incur a prescribed penalty. The trial court directed the jury that the by-law, being in force a year only, had expired so that the defendant could not be called upon to answer for a violation which occurred during the designated period. The state appellate court reversed, saying that when laws 'expired by their own limitation, or are repealed, they cease to be the law in relation to the past, as well as the future, and can no longer be enforced in any case. No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves, or were repealed. It has never been decided that they ceased to be law, merely because the time they were intended to regulate had expired. A very little consideration of the subject will convince anyone that a limitation of the time to which a statute is to apply, is a very different thing from the limitation of the time a statute is to continue in force'."

So the Supreme Court held that it was the resolution of Congress which had been violated, not the proclamation of the President, but the proclamation merely fixed the limits within which the prohibitory provisions of the Resolution were in force. If the Resolution had expired under its terms, the court conceded the prosecutions under it would fall.

An examination of the cases undoubtedly shows that a prosecution for alleged criminal acts in violation of a temporary law cannot be instituted and maintained

after the law has expired under its own terms, and that the General Savings Clause, R. S. Sec. 13, applies only to acts repealed.

The question now presents itself as to whether the extension of the Connally Act by the Act of June 14, 1937, will be construed prospectively, and not retroactively as to past offenses.

II.

To the effect that the extension of the Connally Act by the amendment of 1937 and of the Texas Proration Act by the amendment of 1937 will be construed prospectively, and not retroactively to extend prior offenses.

AUTHORITIES

Kring vs. State of Missouri, 17 Otto. 221, 107 U. S. 231, 27 L. ed. 509, 2 S. Ct. 451;

Murray vs. Gibson, 15 How. (U. S.) 421, 14 L. ed. 755;

Brewster vs. Gage, 280 U. S. 338, 74 L. ed. 457, 463;

United States vs. St. Louis, S. F. & T. R. Co., 270 U. S. 1, 70 L. ed. 435;

United States vs. Magnolia Petroleum Co., 276 U. S. 150, 72 L. ed. 509;

Russell vs. United States, 278 U. S. 181, 73 L. ed. 255;

Chew Heong vs. United States, 112 U. S. 536, 28 L. ed. 770;

Article 1, Sec. 9, Par. 3, Constitution of U. S.;

Article 1, Sec. 16, Constitution of Texas;

State vs. Sneed, 25 Tex. Supp. 66;

Moore vs. State, 14 Vroom 203, (N. J.), 39 Am. Dec. 558;

People vs. Lord, 12 Hun. (N. Y.) 282;

Dash vs. Van Kleeck, 7 John 477 (N. Y.);

State vs. Hazard, 8 R. T. 273, 5 Am. Dec. 291;

Wharton's Criminal Pleading and Practice (8th Ed.), note p. 211, Sec. 316;

32 Tex. Jur. Sec. 5;

Phillips vs. State, 244 S. W. 147;

Plachy vs. State, 239 S. W. 979.

ARGUMENT

The Federal rule and the rule in Texas as to what constitutes an *ex post facto* law is the same.

Article 1, Sec. 9, Par. 3, of the Federal Constitution, places a limitation upon Congress:

> "No Bill of attainer or *ex post facto* law shall be passed."

The best statement of what constitutes an *ex post facto* law is to be found in Kring vs. State of Missouri, 17 Otto 221, 107 U. S. 231, 27 L. ed. 509, 2 S. Ct. 451. The Court says:

> "Any law is an *ex post facto* law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which in relation to that offense or its consequences, alters the situation of the party to his disadvantage, and no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

The case cites State vs. Sneed, 25 Tex. Supp. 66, and the famous case of Hartung vs. People, 22 N. Y. 95.

An examination of the case of Moore vs. State, 14 Vroom 203 (N. J.), 39 Am. Rep. 558, will give a complete history of the doctrine of *ex post facto* law. A splendid note is found in 37 Am. St. Rep. 586, where the case of People vs. Lord, 12 Hun. 282, is cited. We will discuss this case later.

From the early case we learn that Blackstone's definition of *ex post facto* is to be taken as illustrative and not all inclusive.

A temporary act like the Connally Act and the Proration Act is analogous to statutes of limitation. In enacting the laws, there is a limit beyond which the sovereign has provided the act shall cease to be an offense.

With reference to statutes of limitation Wharton's Criminal Pleading and Practice (8th Ed.) states the rule:

> "While, as will be hereafter seen, courts look with disfavor on prosecutions that have been unduly delayed, there is, at common law, no absolute limitation which prevents the prosecution of offences after a specified time has arrived. Statutes to this effect have been passed in England and in the United States which we now proceed to consider. We should at first observe that a mistake is sometimes made in applying to statutes of limitation in criminal suits the construction that has been given to statutes of limitation in civil suits. The two classes of statutes, however, are essentially different. In civil suits the statute is interposed by legislature as an impartial arbiter between two contending parties. In the construction of the statute, therefore, there is no intendment to be made in favor of either party. Neither grants the right to the other; there is therefore no grantor against whom the ordinary presumptions of construction are to be made. But it is otherwise when a statute of limitation is granted by the State. Here the State is the grantor, surrendering by act of grace its right to prosecute, and declaring the offence to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense; that the offender shall be at liberty to return to his country, and resume his immunities as a citizen; and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such

liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt. . . ."

This language is taken from People vs. Lord, 12 Hun. (N. Y.) 282. There the court held a law which sought to extend the limitation for an offense void so far as it applied to offenses already committed. A member of the New York Assembly was indicted for accepting a bribe. The period of limitation was three years. Prior to the expiration of the three years, and before the offense was barred, the legislature extended the three-year period to five years. After the three years had expired but before the five years an indictment was brought. The court held that the law extending the time did not apply to offenses committed before the time had been extended. This case has been cited with approval throughout the history of New York, and as late as People vs. Speiger, 277 N. Y. S. 602.

It would seem from the foregoing authority that a law which extended the time within which a prosecution could be commenced after the commission of the alleged offense would be *ex post facto* as to such offense and would be construed as applying only to offenses committed in the future.

The New York case cites and relies upon the case from the Supreme Court of the United States, Murray vs.

Gibson, 15 How. (U. S.) 421, 14 L. ed. 755. This latter case arose from Mississippi where a statute passed in 1846 declared that no record of any judgment recovered in a foreign court against a citizen of Mississippi should be received in evidence in the state after the expiration of three years from the date of the judgment. The Supreme Court held that the statute had no application to judgments rendered before its passage. This is in line with the doctrine announced in the case of Bear Lake & R. Waterworks & L. Co. vs. Garland, 164 U. S. 1, 41 L. ed. 327 (d. c. p. 33, 1st col. par. 2). There the Court says:

> "It may be assumed that where a statute creates a right not known to the common law, and provides a remedy for the enforcement of such right, and limits the time within which the remedy must be pursued, the remedy in such cases forms a part of the right, and must be pursued within the time prescribed, or else the right and remedy are both lost."

In the case of United States vs. Salsberg, 287 Fed. 208, the circuit court of appeals holds that this question is not necessary to a determination of the case, but cites as decisive of the question the line of cases which we have discussed.

However, the question is not whether the Connally Extention Act of 1937 would be void if they applied to past offense under the express declaration of their terms. The act does not purport to apply to past offenses, and it is well settled that acts will not be construed as retroactive unless such a purpose clearly appears from the act itself.

The Texas rule is in line with the rule announced by the decisions of this court.

The Texas Constitution, Art. 1, Sec. 16, expressly prohibits "retroactive" laws. And as said in 32 Tex. Jur., Sec. 5, p. 756:

> "A statute imposing a penalty is not construed so as to give a right to the penalty for an act done prior to the effective date of the statute. So to construe it would offend Constitution, Art. 1, Sec. 16. On the other hand, a right to a penalty is not a vested one; consequently, the repeal of a statute imposing a penalty extinguishes (in absence of a saving clause) any right of a action previously accrued."

The result of the provision of the Texas Constitution and the Constitution of the United States, Art.1, Sec. 9, Par. 3 is the same.

So in Texas the cases of Phillips vs. State, 244 S. W. 147, and Plachy vs. State, 239 S. W. 979, 91 Cr. Rep. 405, it was held that the law of the 37th Legislature declaring a purchaser of liquor no longer an accomplice did not apply to offenses committed prior to the passage of the act.

When the Texas Proration Act of 1935 and the Connally Act of 1936 were passed, both acts by their terms showed a definite intention to limit the operations to a period of two years. They were definitely emergency acts. No provision was contained in either act for a continuance of offenses after the acts expired. When they

were re-enacted by the Acts of 1937, the Legislature extended the provisions for future offenses, but there is nothing in the extending acts to indicate a purpose of extending prosecutions as to past offenses.

In the case of Brewster vs. Gage, supra, the Supreme Court through Mr. Justice Butler says:

> "Ordinarily statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears."

The case of Russell vs. United States, supra, is very much in point. It was contended by the Government that the time to bring suits for income tax had been extended from five, after the return is made, to six years after the assessment by the Act of June 2, 1924. The suits would have been barred in five years on June 12, 1924. The court held that the Act of 1924 extending the limitation, *even though effective before the suit was barred by the five-year statute*, did not apply to taxes assessed under prior acts. The court says:

> "Manifestly, but for Sec. 278 petitioners would be free from liability under the five-year limitation in the Act of 1918, continued by the Act of 1921. If Sec. 278 refers only to assessments made after June 2, 1924, petitioners are not liable.
>
> "If an assessment made before that date comes within the ambit of Sec. 278, its effect *would be retroactive*, and certainly it would produce radical change in the existing status of the claim against the petitioners—*would extend* for some five years a liability which had almost expired. United States

vs. Magnolia Petroleum Co., 276 U. S. 160, 72 L. ed. 509, 48 Sup Ct. Rep. 236, declares: 'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.' No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 278 or elsewhere."

So in this case when the Connally Extension Act of 1937 was passed on June 14, 1937, but two days within which the right to proceed against these defendants remained. The extension act was passed extending this two-day period for two years and fourteen days. Such a construction would certainly, as the Supreme Court says, "produce a change in the existing status" of these defendants. Such a construction will not be given to the Act unless the purpose clearly appears.

In passing upon a statute extending the period of limitation, in United States vs. St. Louis, S. F. & T. R. Co., supra, Mr. Justice Brandeis says:

"That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this court to statutes governing procedure. (Citing cases.) There is nothing in the language of paragraph 3 of Sec. 16, or any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies under the circumstances, to causes of action existing at the date of the act."

Another pertinent case is Chew Heong vs. United States, supra, in which the Supreme Court refused to give a retroactive effect to the Chinese Exclusion Act.

It would seem clear from the foregoing cases that the Connally Extension Act of 1937 would not be given a retroactive construction so as to extend offenses committed under the original act, and which offenses would have become barred in two more days when the extension Act of June 16, 1937 became effective.

It is not contended in the Government's brief that the result of its position would not be to give a retroactive effect to the Act of June 14, 1937, but the Government contends that such a result is to be inferred from the very passage of the act itself. But as said by the trial court, nothing in the line of cases cited by the Government sustains any such rule of construction, and the Government wholly ignores the decisions of this court to the contrary.

It would have been an easy matter for Congress to have said in no uncertain words when the Connally Act was extended that past offenses should be kept alive and subject to future indictments. The able Junior Senator from Texas who sponsored the act as originally passed and the extension is too able a lawyer to be charged with having failed to express his intentions in the act itself.

There is a significant matter which supports the position of appellees. Recently there has been considerable

public sentiment for the extension of the policy of the Connally Act as permanent legislation. Senator Connally has introduced in the Senate, and from the public press it appears the Senate has passed, Senate Bill 1302 (introduced February 13, 1939) which repeals Section 13, of the Act of February 22, 1935, as amended by the Act of June 14, 1937. The effect of the bill would be to extend the Connally Act indefinitely as a permanent policy of the Government. Inasmuch as the act is to become permanent, the Senate has expressly showed its intention to keep alive offenses committed under the previous acts. Section 2 of the proposed law reads,—

> "Sec. 2. (a) No action or prosecution for the enforcement or collection of any penalty, forfeiture, or liability for any violation of such Act, before or after the date of enactment of this Act, shall be deemed to be barred or prevented by reason of the expiration, after the date of such violation, of (1) the period to which the effectiveness of such Act of February 22, 1935, would have been limited under such section 13, as originally enacted, (2) the period to which the effectiveness of such Act would have been limited under such section 13, as amended by the Act of June 14, 1937, or (3) the effective period of any State law, regulation, or order, with respect to contraband oil.
>
> (b) If any provision of this section, or the application thereof to any person or circumstance or with respect to any period of time, shall be held invalid, the remainder of the section, and the application of such provision to other persons or circumstances or with respect to other periods of time, shall not be effected thereby."

This is very definite language and the intention of Congress, if the bill becomes a law, cannot be mistaken. But it would seem a travesty upon all rules of statutory construction to contend that a law without the provisions above would mean the same thing, and that a court should give to the statute without such a provision the same effect as if the provision is included.

Words would indeed be futile things if courts, in their absence and when they are not expressed, implied their use and read into statutes language which could have been included by simple and clear expression.

It is true as argued by the Solicitor General in his brief that courts will imply in statutes a meaning reasonable essential to the carrying out of the purpose for which the act was passed. But it seems hardly logical to contend that when a statute is passed for the purpose of making certain acts a crime on and after a given date that it is essential to the effectiveness of the statute to imply a retroactive intention that the same acts committed prior to said date should be subject to indictment and punishment along with future offenses. It is equally illogical to contend that Congress, intending to enact a mere temporary expedient, intended to send men to the Federal Prison under indictments brought after the time which Congress under its own enactment intended there should be no violation of the law.

Congress had the right to extend the time for the expiration of the Connally Act. This it did.

Congress also had the right to preserve the penalties under the original act. This it did not do.

A DISCUSSION OF THE ENGLISH AUTHORITIES AND TEXTS CITED AND REFERRED TO BY THE GOVERNMENT.

The preceding portions of appellees' brief were written in main before appellees were furnished with a copy of the Government's brief. Counsel writing this brief was away from his office for a month in the trial of a case in another state. The English authorities were not available. After carefully reading the English authorities and the texts cited by the Government, we can find nothing therein that mitigates in the least against the authorities discussed and propositions laid down in the foregoing portions of this brief.

It is not appellees' contention that there were two separate laws represented by the Connally Act of 1935 and the act of 1937. To argue such a question is mere quibbling. The exact facts are, there were two acts. The first act was passed in 1935 and would have expired June 16, 1937. But a second act was passed extending the expiration date of the first act, so that the first act did not expire.

The important questions are,—

1. Would offenses committed under a temporary act lapse when the act expired.

2. Did the act extending the temporary act have the retroactive effect of continuing offenses committed before the act was extended.

There is nothing in any of the authorities cited by the Government contrary to the decision of the trial court.

Let us take the first English case cited by the Government.

In *Dingley vs. Moor*, Cro. Eliz. 750, 78 Eng. Rep. 982, it appears that a temporary statute had been made permanent. *The offense involved in the indictment was committed after the statute had been made permanent.* There was no question involved as to an offense committed while the act was merely temporary.

The indictment charged the offense "*contra forma statuti,*" and it was contended that the indictment should have used the word "*statutorium.*" It is apparent, and one need only a smattering of Latin to get the point, that the only question involved was,—Could the offense, committed after the temporary act had been made permanent, be charged under the original act. The court held that it could.

The cases of *Rex. vs. Morgan, 2 Strange 1066, 93 Eng. Rep. 1036; Shipman vs. Henbest, 4 T. R. 109, 100 Eng. Rep. 921;* and *Ex parte Drydon, 5 T. R. 417, 101 Eng. Rep. 235* decided the same question. We had been unable to find *Rex vs. Swiney, Alcock & N. 131, 132* (1832). But we assume it is in line with Dingley vs. Moor, supra, as the Government so cites it.

All these cases hold that the extension of the time for a temporary act to expire extends the original act. But none hold that the offenses committed under the act before it was extended could be prosecuted after the statute would have expired.

The Government cites Kent's, *Commentaries*, (14 Ed.), Vol. 1, p. 465. We have located the reference in the 13th Edition, Vol. 1. Part III, Lect. XX, Part 6, p. 465. The Government does not quote from the learned Chancellor. The Solicitor evidently refers to the latter portion of the paragraph. We will quote the first part, which is one of the clearest statements of the rule as applied by the trial court in this case. Like the trial court, Chancellor Kent grounds his statement of the rule on the case of The Irresistible, supra. The text says,—

"*EFFECT OF TEMPORARY STATUTES.*—If an act be penal and temporary by the terms or nature of it, *the party offending must be prosecuted and punished before the act expires or is repealed.* Though the offense be committed before the expiration of the act, the party cannot be punished after it has expired, unless a particular provision be made by law for the purpose." The text cites the long line of decisions relief upon by appellees. (Italics above ours.)

The Chancellor then announces the rule of Dingley vs. Moor, supra, which has no application here.

The Government quotes from Endlich, Interpretations of Statutes (1888), p. 693, where the rule of Dingley vs. Moor is laid down.

But on page 680, Sec. 478, of the same volume of Endlich, the author says,—

"Where an act expires or is repealed, it is, as regards its operative effect (in the absence of provision to the contrary), as if it had never existed, except as to matters and transactions past and closed. . . . where, therefore, a penal law is broken, the offender cannot be punished under it, if it expires (or is repealed) before he is convicted, although the prosecution was begun while the act was still in force (unless the repealing act contains a saving clause." This text cites cases from every English speaking jurisdiction. Yet the able Solicitor General tells us in his brief that it is doubtful whether the rule of The Irresistible, supra, ever existed at Common Law to temporary acts.

Again at page 682, Sec. 479, the same author says,—

"Wherever the jurisdiction exercised in proceedings depends wholly upon statute, and the statute is repealed, or expires by its own limitations, the jurisdiction is gone, and with it the whole proceeding, imperfect at the time of the repeal or expiration, falls to the ground, unless there be a reservation as to pending rights or causes." Citing the line of authorities relied upon by appellees.

The Government tells us to see also *Dwarris, Statutes (2nd Ed. 1848) p. 528.* The earlier edition was not available but we found *Dwarris (1885) on Statutes and Constitutions.* The text says,—

"When an act of parliament is repealed, it must be considered (except as to transactions past and closed as if it had never existed. . . . So, in a criminal case, (citing Rex vs. McKenzie, supra) an act from its passing repealed a former act, which ousted clergy from a certain offense, and imposed a new penalty on the same offense from and after its passing. It was held that an offense committed before the passing of a new act, but not tried till after, was not liable to be punished under either of these statutes. For the former act was repealed; and as to the latter, *the provisions cannot be retrospective, unless declared to be so by express words; either by an enumeration of the cases in which the act is to have a retrospective operation, or by words which can have no meaning unless such construction is adopted.*" Citing Churchill vs. Crease, 5 Bing. 178, Torrington vs. Hargraves, id 492. (Italics ours.)

The authorities above cited by the Government merely more clearly illustrate the rule that where a criminal statute expires under its own term or is repealed, in absence of a saving clause, all prosecutions stop. This court has settled the question that the general saving clause of Revised Statutes, Sec. 13 applies only to repeals.

The Government also cites the English case of Stevenson vs. Oliver, 8 M. & W. 234 (1841), 151 Eng. Rep. 1024. The Government concedes that the statements relied upon are *dicta*. And it appears that the *dicta* was expressly overruled by Darling, J., in *Rex vs. Ellis, 125*

L. T. R. 397, relying upon *Rex vs. McKenzie, Russ & R. 429 (1820), 168 Eng. Rep. 881.*

The Government says Rex vs. McKenzie dealt with a repeal and not an expiration. But at common law there was no distinction, and the only distinction ever made by any authorities is under Revised Statutes of United States, Sec. 13. This section has been held to apply only to repeals.

We think there is nothing in the cases cited by the Government which would tend to show the opinion of the trial court wrong.

CONCLUSION

Appellees submit that the action of the trial court in sustaining the demurrer to the indictment was correct.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 687.—October Term, 1938.

The United States of America, Appellant, *vs.* Neal Powers and Rene Allred.	Appeal from the District Court of the United States for the Southern District of Texas.

[May 15, 1939.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal, under the Criminal Appeals Act of March 2, 1907, (18 U. S. C. § 682) and Sec. 238 of the Judicial Code (28 U. S. C. § 345), from a judgment of a district court sustaining demurrers and motions of the appellees to quash an indictment. (— Fed. (2d) —.)

The indictment, filed September 17, 1938, charges appellees with violations of the Connally (Hot Oil) Act of February 22, 1935, as amended. (15 U. S. C. § 715 *et seq.*) and with conspiracy to violate such Act (18 U. S. C. § 88). The various substantive counts charge that appellees, in violation of the Act, as amended, transported in interstate commerce from the Conroe Oil Field in Montgomery County, State of Texas, to Marcus Hook, Pa. certain petroleum products in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of Texas and the regulations and orders prescribed by the Railroad Commission of Texas. These transportations are alleged to have been made on various dates from November 4, 1935, to March 20, 1936. The conspiracy count charges a conspiracy by appellees to violate the Act, as amended, by producing, transporting, and withdrawing from storage petroleum in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of Texas and the regulations and orders promulgated thereunder. These transportations are alleged to have been made between the same places alleged in the substantive counts, on various dates from on or about September 4, 1935, to on or about March 15, 1937.

Sec. 12 of the Act of February 22, 1935, provided that "This Act shall cease to be in effect on June 16, 1937." This section was

amended by the Act of June 14, 1937, "by striking out 'June 16, 1937' and inserting in lieu thereof 'June 30, 1939' ". No other amendments to the Act were made.

The single question before us is whether violations of this Act alleged to have been committed prior to June 16, 1937, may be prosecuted under an indictment returned subsequent thereto. The district court by sustaining the demurrers and motions to quash answered that question in the negative. We think it erred.

The Congress alone may declare whether those who, before June 16, 1937, violated the Act may be prosecuted thereafter. The question is one of the purpose of Congress. Explicit provisions in the amendment preserving the right of prosecution after the date originally set for expiry of the Act would have made that purpose clear beyond question. But the surrounding circumstances here make this purpose as clear and as unequivocal as an explicit provision. This is an Act designed to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil, (as defined in the Act) and to encourage the conservation of deposits of crude oil within the United States. Administrative machinery is provided for the control of shipment or transportation of contraband oil in interstate commerce. Secs. 4, 5 and 9. Such shipment or transportation is prohibited, unless on appropriate findings the President, by proclamation, lifts the prohibition. Secs. 3 and 4. Penalties are provided for violations of the Act or any regulations prescribed thereunder. Secs. 6 and 7. And section 10 implements the Act with civil and criminal procedures to enforce its sanctions. The Act is thus a self-sustained and organic whole, equipped to effectuate a declared policy of the Congress. By its original terms it would have expired June 16, 1937. But it never expired, for on June 14, 1937, the whole Act was continued in effect until June 30, 1939. Its substantive phases were not altered one whit or tittle; its sanctions were neither reduced nor increased. Precisely the same acts continue to be prohibited after the amendment as before. The amendment merely perpetuated the entire Act for another term.

In view of these circumstances, it seems clear beyond question that it was the purpose of Congress, expressed in the amendment of June 14, 1937, to treat this Act precisely in the same way as if

by its original terms it was to expire on June 30, 1939. Due to the amendment, the Act has never ceased to be in effect. No new law was created; no old one was repealed. Without hiatus of any kind, the original Act was given extended life. There was no First Connally Act followed by a Second Connally Act. During the periods in question there was but one Act. No evidence has been brought to our attention, and we have found none, that Congress proposed to waive or to pardon violations which occurred prior to June 16, 1937, but which were not prosecuted until subsequent thereto.

There is a secondary consideration which points to the same conclusion. If the appellees are right in their contention, a temporary act such as this one would lose, as a practical matter, some of its sanctions. Violations could occur with impunity months before its expiry, for in practice there frequently is an unavoidably substantial lag between violation and prosecution. The statute should not be so construed if another interpretation will make it effective. As this Court said in *Bird* v. *United States*, 187 U. S. 118, 124, "There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience." We are unwilling to conclude that although the same acts continue to be prohibited after June 16, 1937, as before, violations committed prior to that date are not punishable thereafter.

In view of this conclusion, we do not reach the nub of appellees' argument based on Chief Justice Marshall's statement in *The Irresistible*, 7 Wheat. 551, 552 "that an offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose." For in this case, as we have said, the Act of February 22, 1935, did not expire on June 16, 1937.

But even if we assume the validity of that statement, it seems to us clear that though the Act be treated as having expired or terminated on June 16, 1937, the result is the same. For in this case "particular provision" has been made "by law for the purpose" of extending the enforcement machinery with reference to prior criminal violations. The "particular provision" was the amendment of June 14, 1937, extending the effective period of the Act. That amendment was passed prior to the original expiration date. When read in light of the title of the amendatory statute, viz.

"An Act to continue in effect until June 30, 1939, the Act . . . approved February 22, 1935", the statement of purpose becomes plain and unambiguous. If the amendment of June 14, 1937, had merely "extended" the duration, or postponed the expiration, of section 10 of the Act dealing with criminal penalties, "particular provision" for subsequent prosecutions would have been indubitably clear. The fact that all sections, including section 10, were extended makes it nonetheless plain. The whole, though larger than any of its parts, does not necessarily obscure their separate identities.

In view of these various considerations, we hold that this prosecution does not offend the prohibition in Article I § 9, cl. 3 of the Constitution against *ex post facto* laws.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.